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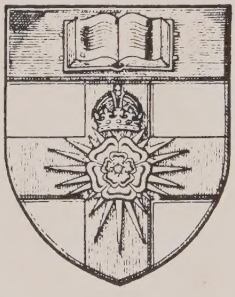

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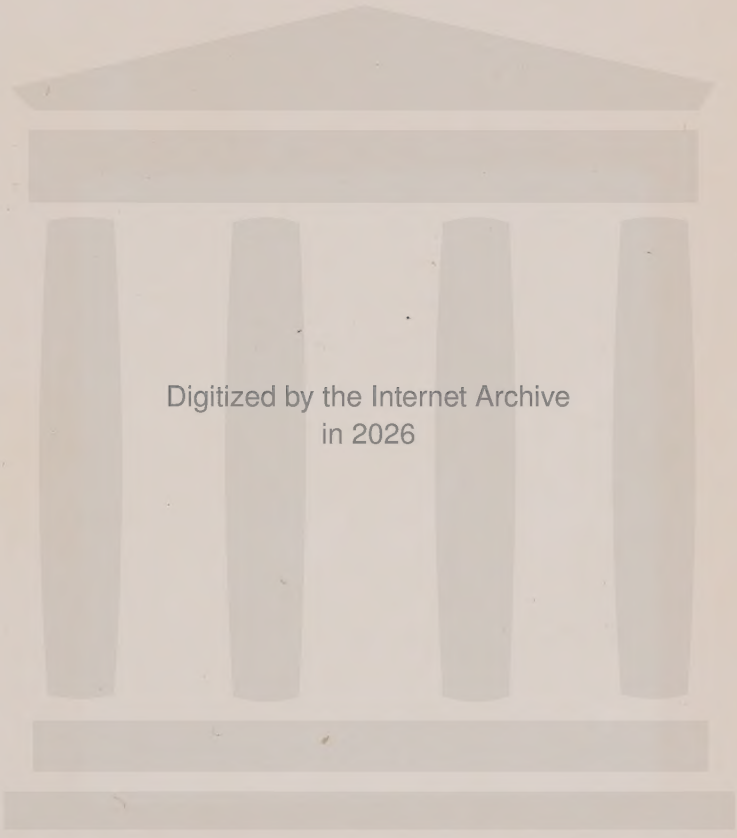

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re FASEY.

Ex parte TRUSTEES.

[No. 1507 of 1921.]

C. A.
1923
P. O.
LAWRENCE
J.
Jan. 22.
C. A.
March 2.

Bankruptcy—Fraudulent Conveyance—Debtor Insolvent—Agreement to assign substantially Whole of Property, including Business, to limited Company—Company's Undertaking to pay Business Creditors—Debtor and One of his Creditors the only Directors and Shareholders—Devise to defeat and delay Judgment Creditors—13 *Eliz. c.* 5.

A builder, in embarrassed circumstances, against whom numerous creditors had obtained judgments, entered into an agreement on July 29, 1921, with an agent on behalf of a company to be formed, whereby he agreed to sell to the company all his property (including his business) with certain exceptions of inconsiderable value, in consideration of 30,000*l.* to be satisfied by the allotment to the vendor or his nominee of 30,000 fully paid 1*l.* shares in the capital of the company, the appointment of the vendor as governing director at a salary of 2500*l.* a year, and an undertaking by the company with the vendor to pay and discharge the business debts and liabilities of the vendor and indemnify him against the same. The company having been incorporated and having adopted the agreement, the vendor and his solicitor became the directors and were the only shareholders of the company. They allotted to the vendor 10,000 shares and to his solicitor 20,000 shares, being the whole of the issued capital. That allotment to the solicitor was in pursuance of a prior agreement made in March, 1921, whereby the vendor agreed

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to allot those shares to his solicitor in satisfaction of the amount alleged to be owing to him by the bankrupt on an account stated. The vendor was adjudicated bankrupt on April 11, 1922, on a judgment creditor's petition.

On an application by the trustees in the vendor's bankruptcy impeaching the agreement of July 29, 1921, under the statute 13 Eliz. c. 5 :—

Held (affirming the decision of P. O. Lawrence J.), that the facts showed that the whole object of the agreement was, under the cloak of a company, to remove the assets of the bankrupt from the reach of his creditors and to retain for the bankrupt the benefit of them and thereby defeat and delay his creditors within the meaning of the statute of Elizabeth.

Held, also, that the fact that one of the creditors incidentally obtained a benefit from the transaction did not prevent the transaction from being void under the statute.

THIS was a motion by the trustees in the bankruptcy of William Robert Fasey that an agreement, dated July 29, 1921, by the bankrupt to assign his property might be declared void under the statute 13 Eliz. c. 5.

W. R. Fasey, who carried on the business of a builder and contractor under the style of "Anthony Fasey & Son," in 1920, entered into separate building agreements with three corporations. By each of those agreements he agreed to build 100 houses. Under the terms of the agreements the bankrupt was to open special banking accounts into which the corporations were to make weekly and monthly payments to meet disbursements on account of wages and materials purchased by the bankrupt for the purpose of carrying out the contracts with the corporations. The payments were to be made upon the certificates of their engineers to whom the bankrupt was to produce the receipts for the payment of the goods ordered by him. Large sums having from time to time been paid to the bankrupt by the corporations without their having previously required proper vouchers, the bankrupt diverted those payments into other channels, instead of applying them in payment of the goods for which he had become liable in respect of the building operations; and by July 29, 1921, the date of the above-mentioned agreement, he had diverted no less a sum than 15,000*l.* Besides his building operations the bankrupt was also interested in several other ventures and undertakings.

In July, 1921, the creditors who had supplied the goods commenced actions against the bankrupt, and at the date of the agreement in question numerous judgments had been obtained against him by those creditors; and, as the evidence showed, his liabilities then amounted to more than 42,000*l.*, and towards the end of July, 1921, the financial position of the bankrupt was hopeless.

The bankrupt, with the aid of his solicitor, Mr. Timbrell, staved off his creditors as long as possible by defending actions to which there could be no defence, and by these means (as the Court found) prevented a petition in bankruptcy founded on the agreement of July 29, 1921, as an act of bankruptcy, from being presented within three months of its execution.

In March, 1921, when creditors were pressing, Mr. Timbrell, who, besides being the bankrupt's solicitor, was fully acquainted with all his affairs and had assisted him in sundry ventures, made out an account against the bankrupt, alleging that he was his creditor for 14,500*l.*; and by an agreement between them, dated March 17, 1921, it was agreed that the amount owing to Mr. Timbrell by the bankrupt should, as on an account stated between them, be taken to be the sum of 14,500*l.*; and it was agreed that that sum should be satisfied by Mr. Timbrell accepting certain equities, one of which was worth about 200*l.*, and 20,000 1*l.* fully paid shares in a company to be formed to take over the bankrupt's business.

In these circumstances the agreement of July 29, 1921, which it was sought to set aside, was entered into between the bankrupt and one William Chant on behalf of a company to be formed and called "Anthony Fasey & Son, Ld.," with a capital of 50,000*l.* divided into 1*l.* shares, whereby the bankrupt agreed to sell to the company the property, assets and effects of the bankrupt, comprising (inter alia) the goodwill of the bankrupt's business, the freeholds belonging to him in connection with the business and the plant, machinery and book-debts, for the sum of 30,000*l.*, to be satisfied by the allotment to the bankrupt or his nominees of 30,000 1*l.* fully paid shares in the capital of the company, the appointment of the bankrupt as governing director at a salary of

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2500*l.* a year, and an undertaking by the company, when formed, to pay and discharge all the debts, liabilities and contracts of the bankrupt in relation to the business of Anthony Fasey & Son (which amounted approximately to 26,000*l.*), and to indemnify the bankrupt against all proceedings, claims and demands in respect thereof. The company, "Anthony Fasey & Son, Ld.," was accordingly incorporated on July 30, 1921, and the agreement was adopted by that company on August 17, 1921. The bankrupt and Mr. Timbrell were the directors and the only shareholders of the company: they were the only subscribers of the memorandum of association, and allotted to themselves 30,000 1*l.* fully paid shares, being the only part of the capital of 50,000*l.* which was issued, the bankrupt taking 10,000 and Mr. Timbrell 20,000 shares.

The petitioning creditors issued their writ on August 11, 1921, and obtained judgment under Order XIV. on October 1, 1921. They served a bankruptcy notice on November 1, 1921; the petition in bankruptcy was filed on November 28, and the bankrupt was adjudicated bankrupt on April 11, 1922.

The trustees moved for a declaration that the agreement of July 29, 1921, was void as against the trustees under the statute 13 Eliz. c. 5 and for an order upon the respondents, Anthony Fasey & Co., Ld., to hand over to the trustees the property assigned under the agreement, or to pay them the value thereof.

The motion was heard before P. O. Lawrence J. on January 22, 1923.

A. Grant K.C. and *Tindale Davis* for the trustees. The formation of the company was a fraudulent device by the bankrupt to defeat and delay his judgment creditors by placing his property beyond their reach. The case falls within the principle of the decisions in *Gonville's Trustee* v. *Patent Caramel Co.*(1); *In re Goldburg* (No. 2)(2); and *In re Carl Hirth.*(3) *In re Carl Hirth*(3) was decided under the Bankruptcy Act, 1883,

(1) [1912] 1 K. B. 599. (2) [1912] 1 K. B. 606.
(3) [1899] 1 Q. B. 612, 625.

and not under the statute of Elizabeth. The purchasing company, which was in effect the vendor and his nominee, of necessity, had full notice of the nature of the transaction, that its purpose was to defeat creditors: Vaughan Williams L.J. in that case said (1) that he would have been prepared to hold that at the date of the conveyance in that case to the company, the company by its agent, the managing director Hirth himself, had full notice of the nature of the transaction so as to bring it within the operation of the statute of Elizabeth and could not claim the protection of being a bona fide purchaser for value without notice. *Ex parte Chaplin* (2) was a decision under the Bankruptcy Act, 1869, but Fry L.J. was of opinion that the assignment was executed with intent to delay and hinder creditors and was void under the statute of Elizabeth.

Hansell for the company. The sale to the company cannot be impeached under the statute of Elizabeth, There is a sharp distinction between cases under that statute and cases under the Bankruptcy Acts. The Bankruptcy Acts prohibit fraudulent preference of creditors which is not prohibited by the statute of Elizabeth. Under the agreement the company undertakes to pay the bankrupt's business creditors and to indemnify him against the debts due to them. The creditors can compel the debtor to enforce his right under the agreement against the company. The benefit of that contract of indemnity passed on the bankruptcy of the debtor to his trustees in bankruptcy. The effect of the transaction was to give a particular class of creditors a preference over other creditors. In *Gonville's Trustee* v. *Patent Caramel Co.* (3) the company did not assume any liability to pay creditors of the debtor. It therefore was not a case of preferring creditors. An intention appearing to prefer one class of creditors to another or the fact that some creditors are not provided for is not sufficient evidence of a design to defraud creditors: the question of consideration is material; there may be purposes other than the defeating of creditors, and the presence

(1) [1899] 1 Q. B. 612, 625. (2) (1884) 26 Ch. D. 319.
(3) [1912] 1 K. B. 599.

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of consideration generally makes the task of the party seeking to upset the assignment more difficult: *In re Johnson* (1); *Alton* v. *Harrison* (2); *Boldero* v. *London and Westminster Loan and Discount Co.* (3) The onus of proof is on the trustees, because the only effect of the contract of indemnity is to give a preference to one set of creditors over another. The company is a recognized legal entity, legitimately incorporated, and was not guilty of mala fides.

P. O. LAWRENCE J. This is a motion by the trustees in bankruptcy of William Robert Fasey for a declaration that an agreement of July 29, 1921, made between the bankrupt and William Chant, on behalf of a company to be formed, and which agreement was adopted by the company on August 17, 1921, is void and of no effect as against the trustees under the statute 13 Eliz. c. 5.

Notwithstanding the able argument which was addressed to me by Mr. Hansell, I have come to the conclusion that this is a clear case for acceding to the motion. [His Lordship then stated the facts above set forth relating to the building contracts entered into by the bankrupt with the three corporations and the actions against the bankrupt pending at the end of July, 1921, and continued:] The bankrupt was in a parlous condition in July, 1921, hemmed in on all sides. The corporations, on his non-compliance with the terms of the arrangement made by him, had stopped their payments to him, and, no doubt, matters were rapidly drawing to a head and insolvency was staring him in the face. His solicitor was fully acquainted with the whole of the facts relating to his affairs and was defending all the actions that were being brought against him. In these circumstances the agreement which is sought to be set aside was executed. [His Lordship then stated the agreement of July 29, 1921, and continued:] By this agreement the bankrupt purported to transfer to this company the whole of his property with some slight exceptions. The exceptions

(1) (1881) 20 Ch. D. 389; affirmed (1882) 51 L. J. (Ch.) 503.
(2) (1869) L. R. 4 Ch. 622.
(3) (1879) 5 Ex. D. 47.

consisted of first, his interest in the Southwold Harbour property, which being mortgaged for 15,000*l.* was wholly valueless; secondly, an aero-engine, which was lying on the premises of some people who had a claim against the bankrupt for over 800*l.* and who took over the engine and reduced their proof against the bankrupt's estate from 826*l.* to 650*l.*; thirdly, the patent in respect of that engine, which realized a sum of 40*l.*, because it so happened that an inventor desired to get rid of it, as it stood in the way of his obtaining a patent for a machine which he had invented; fourthly, a dredger at Southwold, which realized 153*l.*; and, lastly, an equity of the value of about 120*l.* These are the only items of property belonging to the debtor which were excluded from the transfer to the company. In my opinion, the facts show a clear case of an intent to delay, hinder and defeat creditors. The position was such that the creditors who were pressing, and who had commenced actions, would soon have been able to have obtained judgment and to have taken in execution the property which was transferred to the company. It is, I think, obvious that both the bankrupt and his solicitor must have realized that if the bankruptcy could be staved off for three months after the agreement had been executed, the creditors might have a difficulty in reaching the assets thereby transferred. The three months' period limited by the Bankruptcy Act, 1914, would have elapsed and the creditors would have to show that the agreement was void under the statute of Elizabeth. With Mr. Timbrell's help the bankrupt was, no doubt, able to stave off the inevitable beyond the three months. The agreement provided that the transfer was to be completed in three months' time, but I gather that the company did not go to the useless expense of completing any conveyance or assignment. Had they done so, I do not think that they would have improved their title very much, considering that they were dealing with equities, choses in action and other property which, for all practical purposes, passed by the agreement itself. However, as I have stated, the bankrupt and Mr. Timbrell were successful in staving off the bankruptcy for some months

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longer. It appears that the tactics adopted were to defend every action, except one or two where the amounts claimed were small; and the dates of the various steps in the petitioning creditor's action afford an example of what was being done by the bankrupt and his solicitor in all the other actions. In that action the writ was issued on August 11, 1921; judgment was given under Order XIV. on October 1. An appeal to the judge was lodged and was dismissed on October 12; the case was taken to the Court of Appeal and the appeal was dismissed on October 31; and all this in a wholly undefended case. A bankruptcy notice was served on November 1; an application to set aside the notice was dismissed on November 22; a petition in bankruptcy was filed on November 28, and a receiving order was made on January 10, 1922; an application to set aside that order was refused on March 10, 1922; an appeal to the Court of Appeal against that refusal was dismissed on April 7, 1922; and the debtor was finally adjudicated bankrupt on April 11, 1922. The bankrupt, aided by his solicitor, was truly a past master in the art of delaying the payment of his just debts.

Now, it is contended that in this case no fraudulent intent within the meaning of the statute has been found, because in the agreement there is a provision that the company should pay the debts incurred by the bankrupt in connection with his business, and therefore the utmost that this agreement accomplishes is to defeat and delay creditors of the bankrupt other than his business creditors. I think that there is a complete fallacy underlying this contention. Apart altogether from the fact that these business debts were never paid by the company, and apart from the inference which I draw that there was never the slightest intention on the part of the company to pay these business debts at all, it is clearly settled that such an agreement is not enforceable by the business creditors, and therefore does not amount to a provision for these creditors. It might have been otherwise had the bankrupt assigned the property to the company as a trustee upon trust to apply it in the payment of the business debts, in which case the business creditors might have enforced

the trust. The fact that since the bankruptcy the trustees stand in the shoes of the assignor, has, in my opinion, no bearing on this point: the question which I am considering at present is, whether in July, 1921, the bankrupt made an assignment of his property with the intent of delaying or defeating his creditors generally; and I have no hesitation in finding that he did.

Then, it is further contended that no fraudulent intent on the part of the company has been shown and that such intent is essential in order to enable the Court to declare the agreement void under the statute. In my view, that contention is unsound. What is required by the Act to be shown, where there is a conveyance for valuable consideration, is that the purchaser had notice or knowledge of the fraudulent intent. The case of *In re Johnson* (1), cited by Mr. Hansell, does not, in my opinion, support the view that you must show that the company actively took part in the fraudulent intent of the assignor. The passage in the judgment of Fry J. which was relied upon by Mr. Hansell merely decided, in my opinion, that where you have a conveyance for valuable consideration, it is essential to show that the purchaser has concurred in the fraudulent intent of the vendor; that is to say, has accepted a conveyance of the property with the full knowledge that the sole reason which induced the vendor to convey it was to delay, hinder or defeat his creditors. There is nothing in that passage to indicate that the purchaser must be actively engaged in assisting the vendor in the efforts he is making beyond purchasing the property with that knowledge. In my judgment, if he does purchase the property with that knowledge, he is concurring in the intent within the meaning of *In re Johnson*. (1)

On the facts here, it is quite plain that the company had full knowledge of everything that was being done in this case. As its sole directors and shareholders were the bankrupt and Mr. Timbrell, they were the principals concerned in the fraudulent intent.

In my view this is a barefaced attempt to cheat the

(1) 20 Ch. D. 389; affirmed 51 L. J. (Ch.) 503.

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creditors of the bankrupt by a conveyance of the bankrupt's property to the bankrupt himself and to his solicitor, and thereby withdrawing from those creditors the only assets which were really worth having. The company itself, in the circumstances of this case, cannot possibly stand in any better position than the bankrupt; it is really but a name which has been changed.

In these circumstances I am satisfied that the assignment is one which cannot stand, and I will make an order in the terms asked for by the notice of motion.

H. C. H.

C. A.

The company appealed. The appeal was heard on March 2, 1923.

Clayton K.C. and *Hansell* for the appellant company. The facts as proved do not bring the case within the statute of 13 Eliz. c. 5. The judge has misdirected himself by confusing the principles applicable to the Bankruptcy Acts and those applicable to the statute of 13 Eliz. c. 5. The following propositions are, it is submitted, supported by authority :—

1. An intention to prefer a particular creditor and thus to exclude and defeat the other creditors does not bring the case within the statute of 13 Eliz. c. 5: *Holbird* v. *Anderson* (1); *Wood* v. *Dixie* (2); *Middleton* v. *Pollock.* (3)

2. The fact that the assignor was insolvent at the time he made the assignment and that the assignee knew it does not bring the case within the statute.

3. The fact that the assignor is dealing with substantially the whole of his property, although very material in cases of bankruptcy, does not bring the case within the statute: *Alton* v. *Harrison* (4); *Ex parte Games* (5); *Boldero* v. *London and Westminster Loan and Discount Co.* (6)

4. In order to set aside an assignment for valuable consideration it is necessary to prove that it was a contrivance resorted to by the assignor for his protection and to defeat

(1) (1793) 5 T. R. 235.
(2) (1845) 7 Q. B. 892.
(3) (1876) 2 Ch. D. 104.
(4) L. R. 4 Ch. 622.
(5) (1879) 12 Ch. D. 314.
(6) 5 Ex. D. 47.

his creditors; that it was a mere cloak for retaining for himself the benefit of his property against his creditors, in fact that it was a mock assignment: *Ex parte Games* (1); *Glegg* v. *Bromley*. (2)

In order to succeed on an application under the statute of 13 Eliz. c. 5 it is necessary to show that the assignee was a party to the fraud: *In re Reis*. (3) There is here no evidence before the Court of any fraudulent intention on the part of the assignor or assignee to make the assignment a mere mock assignment to enable the debtor to retain for himself the benefit of the property assigned, and so bring the case within the statute.

A. Grant K.C. and *Tindale Davis* for the respondents were not called upon to argue.

LORD STERNDALE M.R. I do not think we can interfere with the learned judge's judgment in this case. This is an application under the statute 13 Eliz. c. 5 to set aside a transfer of substantially the whole of the bankrupt's property to a limited company that was formed for the purpose of being the transferee. Mr. Clayton for the appellant company very properly pointed out to us, and substantiated his point by several authorities, that the considerations that apply to a question under the statute of Elizabeth are very different from those that apply to the question of a fraudulent preference in bankruptcy, because a fraudulent preference constitutes an act of bankruptcy. There is no doubt that the considerations are quite different, although the same circumstances may have to be taken into consideration in each case. I do not think the proposition that a conveyance or transfer for the purpose of giving a fraudulent preference to one creditor is not a defrauding of the creditors generally and would not come within the statute of Elizabeth, can be inverted so as to enable the debtor to say: "I did intend to defraud my creditors, I did intend to hinder them, I did intend to delay them, but incidentally to that intention I

(1) 12 Ch. D. 314. (2) [1912] 3 K. B. 474.
(3) [1904] 2 K. B. 769.

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did give one of them some benefit, and therefore what I did cannot come within the statute of Elizabeth in law." That proposition so inverted cannot be maintained as a general principle. What we have to see is whether this transaction was for the purpose of disturbing, hindering, delaying or defrauding the creditors of the bankrupt.

It is not necessary, in my opinion, to go into the circumstances at any great length. The bankrupt was a builder and contractor; there is no doubt that he was in a hopelessly insolvent position. His solicitor made a claim against him for 14,500*l.*, which the bankrupt admitted, at a time curiously enough when he had in contemplation the formation of the company which was afterwards formed. Whether that claim was good or bad, what happened was this. Being hopelessly insolvent, as I said, and having managed to stave off the rightful claims of his creditors in actions to which he had really no defence by means of affidavits and proceedings, which to say the least of them were doubtful, he then entered into an agreement to assign to a clerk of the solicitor, who was therein described as an accountant, as if he were an independent person, as trustee for a company to be formed, what was admitted by Mr. Clayton to be practically the whole of his assets. The company having been formed adopted the agreement. By the adoption of that agreement it put itself under an obligation contained in one of its clauses to discharge the debts of the business. P. O. Lawrence J. points out that of course that did not give the creditors any right of action against the company itself. It may be that now that the assignor has become bankrupt, the trustees who stand in his place may be in a position to enforce that obligation for the benefit of the creditors. I do not know, but I do not suppose that the debtor at the time of entering into the agreement was contemplating a bankruptcy and the existence of a trustee who would enforce the obligation. As the very object at the time was to stave off bankruptcy, the creditors had no means of enforcing that obligation against the company, certainly no means unless the transferor, the now bankrupt, was prepared to help them, and there is nothing to

show that he was. I do not say that even if he was so prepared they could have done so, but there is nothing to show that he had any such intention, and I think all the circumstances point to his having no intention of the kind. The company issued 30,000 shares fully paid up; of these shares 10,000 were allotted to the bankrupt and 20,000 to the solicitor. The bankrupt and the solicitor were the only shareholders and the only persons who were in any way interested in the transaction. It seems to me that you could hardly have a more transparent attempt to withdraw the assets from the control and rightful seizure by the creditors, unless it can be said that because the transfer was to a limited company, it cannot be interfered with, or unless you can say that, even assuming that the transaction was for the purpose of hindering, delaying or defrauding creditors, the fact that one creditor, the solicitor, got a benefit by the transaction, prevents it from coming within the statute. I do not think you can say either of those things.

Now what was the position? I do not wish to use any such word as "cloak" or "mockery" or any similar metaphorical term, because I think that the use of such words is very often apt to lead one astray, but in my opinion the main object of this transaction was to enable the bankrupt by means of the company and his interest in the company and under—I am afraid I must use the word—the "cloak" of the company, to retain for himself the benefit of the business, and under the name of the company to carry on the business which he had himself previously been carrying on and so to obtain the benefit of all the assets which were transferred to that company, and removed from the reach of his creditors. I do not ignore for the moment, nor do I think the learned judge did, although some of the expressions he used might seem to have that effect, the fact that a company, although it may be composed of one man only, the transferor himself, in this case of two the transferor and his solicitor, is a separate entity. The bankrupt is not the company and the company is not the bankrupt, but it may very well be that the transaction of the transfer to the company is for the purpose of enabling the bankrupt

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under the name of the company, really and substantially himself, to get the benefit of the goodwill and assets of the business which he has transferred to the company. What was the position here? The bankrupt was one of the two and only shareholders of the company, the other being his solicitor. He was the managing director at a salary of 2500*l.* a year payable out of the assets, which but for this transaction would have been available for his creditors. It is true, as I have said, that the solicitor, for either a real or an unreal debt, also obtained some of the shares himself; it is also true that the creditors would, if bankruptcy had not supervened, have had a right to take the shares of the bankrupt in execution, and possibly if they had exercised that right, they would have been able by means of a winding up, or some other proceedings, to get at the assets of the company, because they would then have been shareholders in the company. If to put them to that way of getting their debts paid was not to hinder them, I do not quite know what hindering is. It seems to me quite clear that the whole object of this transaction was to remove these assets out of the reach of the creditors, some of whom had obtained judgments against the bankrupt and were in a position to issue execution, in order that the benefit of the assets might be kept for the bankrupt himself, although under the name of a company.

That being so I think the transaction comes clearly within the statute 13 Eliz. c. 5. Its real object was to defeat and delay the creditors, and the fact that one creditor, the solicitor, incidentally got a benefit does not seem to me to prevent the transaction from being void. It was not a transaction for the purpose of giving the solicitor a preference over other creditors; no doubt it did so incidentally, or might have done so, but that was not its object. The object of it was to keep substantially the assets of the business and the goodwill of the business for the bankrupt himself and to exclude his creditors from payment of their debts. I think that the transaction is clearly void and that the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. Giffard L.J. in *Alton* v. *Harrison* (1) says: "If the deed is bona fide—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." In my opinion this deed was a mere cloak for retaining a benefit to the grantor, the debtor. It may be that the garment is of a fashion and material not known at the date of Giffard L.J.'s judgment, but for all that it may be such a cloak as that to which he is referring. The effect of the agreement was to vest in a company, a separate entity no doubt in law, all, or substantially all, of the assets of which the debtor was possessed. The debtor by the agreement between himself and the company was to receive the whole of the shares—namely, 30,000 out of 50,000, 30,000 being the only shares issued except the one share for which Mr. Timbrell, the solicitor, subscribed. He was to be practically the only person continuing to carry on the business after the agreement as before; he was appointed managing director at a salary of 2500*l.*, afterwards reduced to a smaller sum, but that does not matter. Putting aside for the present the interest which Mr. Timbrell obtained in this company, it seems to me that that transaction is as clearly a contrivance for retaining a benefit to the debtor himself and to leave the creditors in the position of having no power of resorting directly to the assets with which he had parted to the company, with no remedy at all against those assets, except possibly through a winding up, by which they might obtain the benefit of the vendor's shares. It seems to me that clearly is such a contrivance as I have mentioned, and if it does not entirely defeat, it would at all events hinder and delay the creditors in the assertion of their rights.

Now I turn to Mr. Timbrell's position to see whether that in any way alters the case. He knew all about the transaction, he was and had for years been the debtor's solicitor, according to his own statement in the agreement in March the bankrupt was a debtor of his for a large amount, and he had obtained from the debtor in March, the company having been formed

(1) L. R. 4 Ch. 622, 626.

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in the following July, a stipulation, not that if and when the company was formed the company would issue to him shares in part payment of the debt which he claimed, but that the bankrupt should out of the shares which he was going to receive give him 20,000 of them; that is to say, he stipulated for a benefit to himself under an agreement which to his knowledge was a contrivance hindering, defrauding and defeating his creditors. I quite agree it is well settled that the fact that a transaction is and is intended to be a preference of a particular creditor does not of itself bring the transaction within the statute of Elizabeth. But in this particular case what Mr. Timbrell did was to obtain a benefit for himself for what it was worth out of the transaction, which independently of that was in my view a contrivance to hinder or delay the creditors.

Under those circumstances it seems to me that Mr. Timbrell's position does not prevent the Court from setting the agreement aside, and therefore I agree that the appeal ought to be dismissed.

ATKIN L.J. The principle that we have to apply in the construction of the statute of Elizabeth is that which has been mentioned by the Lord Justice as laid down in the judgment of Giffard L.J. in *Alton* v. *Harrison* (1): "If the deed is bona fide—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." Personally I should have been glad to have seen that principle applied by the learned judge below, and to have had his observations upon it. The difficulty I have felt in this case is in respect of the position of Mr. Timbrell, because the learned judge while throwing doubts upon the good faith of the parties, that is to say of the debtor and of Mr. Timbrell, has not found that there was in fact no debt subsisting, or that the agreement made in March was not a genuine settlement of a debt, although there are expressions in his judgment which seem to indicate doubts upon the matter. In the absence of such a finding I think we ought to assume

(1) L. R. 4 Ch. 622, 626.

that there was a real debt and a real agreement disposing of it in the way mentioned in the agreement of March 17, 1921. That agreement was made in March; four months afterwards, with nothing to indicate that the assignment to the company was made in pursuance of that agreement, although it may have been so, this assignment was made to the company. I have no doubt at all myself that if a debtor, being sorely pressed by creditors, does in fact assign the whole of his property to a company of which he becomes the sole shareholder and all the shares are issued to him, an almost inevitable inference would arise that he did that with intent to delay and hinder his creditors. I think that in fact they would be hindered and delayed, because there is no doubt, that although they could seize the shares and although eventually they could, as has been pointed out, by winding-up proceedings get the benefit of the assets, they would be delayed in their remedies against the assets of the debtor.

The question that arises in this case, I think, is whether this transaction by which the issued shares were to be allotted to the debtor, although the debtor in pursuance of an antecedent arrangement was to hand over 20,000 of them or two-thirds of the issued shares to a creditor of his own, can be within the statute of Elizabeth. I think it can. It depends of course on the intent of the parties, and I think the learned judge has meant to find and has found that the intent of both the parties—that is to say, of the bankrupt on the one side, and the bankrupt and the solicitor, who were the directors of the company and the only persons who can represent the mind of the company, on the other side—was that the creditors should be defeated and delayed. We have to bear in mind the fact that a charge on assets given to one creditor, although it may delay and defeat the other creditors, is not within the statute. I am accepting that view, but it seems to me here that the parties have acted upon an arrangement which does in fact retain the benefit for the debtor. It seems to me impossible to say that the learned judge was wrong in finding that this transaction

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was a cloak for retaining the benefit to the grantor, and upon that view the judgment can be supported.

I think myself that it is a little unfortunate that the learned judge used language at the end of his judgment which suggested that there was a conveyance only to the grantor and his solicitor, and that they were the company, language which one is surprised to find used after the decision in *Salomon* v. *Salomon & Co.* (1) Nevertheless I think upon the facts and finding of intention by the learned judge that the true view is that the conveyance is void by reason of offending against the statute of Elizabeth, and therefore I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for trustees in bankruptcy: *Wordsworth, Porter & Shaw.*

Solicitors for company: *Timbrell & Baker.*

W. I. C.

ROMER J. 1922 Dec. 11, 12, 13.

NICHOLLS *v.* TAVISTOCK URBAN DISTRICT COUNCIL.

[1921. N. 2267.]

Market—By-law—Preventing or limiting Sales by Auction—Right of Public to fix Method and Manner of Sale—Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 42—Invalidity.

A by-law made in 1862 by the owners of an ancient public market at Tavistock provided that "no person shall sell or cause to be sold by Auction, Dutch Auction, or Public Competition any goods, articles or things whatsoever, without the consent of the Superintendent, Collector, Inspector or Surveyor of the Markets or his Assistant signified in writing under his hand," and imposed a penalty of forty shillings for a breach of the by-law. Since 1895 sales by auction had become the usual method of disposing of live stock in the market:—

Held, that according to the common law affecting public markets, those who used and had a right to use the public market upon payment of the dues had the right to fix the manner in which their goods should be offered for sale and the purchaser and the price ascertained—namely, by public auction if they so desired, more especially where that was the ordinary method for effecting sales; and that a by-law, whether it

(1) [1897] A. C. 22.

altogether prevented the conduct of sales by auction, or whether, as in this particular case, it only prohibited sales by auction without the consent of the superintendent or other officer of the market, was invalid as being repugnant to the laws of that part of the United Kingdom in which Tavistock was situated, within the meaning of s. 42 of the Markets and Fairs Clauses Act, 1847.

Scott v. *Glasgow Corporation* [1899] A. C. 470 applied.

Wortley v. *Nottingham Local Board* (1869) 21 L. T. 582 followed.

Collins v. *Wells Corporation* (1885) 1 Times L. R. 328 commented on and not followed.

THE defendants, the Tavistock Urban District Council, were the owners of a cattle and other market in Tavistock. The plaintiff Nicholls carried on the business of a farmer in the neighbourhood of Tavistock. His co-plaintiff Callaway was an auctioneer desirous of opening an office for the purpose of his business in Tavistock if he had the right to sell cattle and sheep by auction upon the Tavistock Market. The plaintiffs claimed a declaration that the plaintiff Nicholls was entitled to employ his co-plaintiff Callaway or any other person or persons selected by him as his agents, and that the plaintiff Callaway was entitled as agent for his co-plaintiff Nicholls and for any other person employing him to sell by auction or otherwise in the market at Tavistock all such horses, cattle, sheep, pigs or other animals or other marketable commodities as they or any or either of them might bring to the said market upon payment being made to the defendant of all proper market dues for tolls, stallage and other matters. There was no dispute whatsoever as to the right of the plaintiffs to sell as they thought fit goods otherwise than by auction nor did the plaintiffs claim any right to sell by auction or otherwise anything on the market except on market days.

A market in Tavistock had existed from the time of Henry I., and, after the dissolution of the monasteries, the market came into the hands of the ancestors of the Dukes of Bedford. The market used to be held chiefly in the streets and open spaces of the town. That was found dangerous and inconvenient, and accordingly the Tavistock Markets Act, 1859 (22 Vict. c. xxxiii.), was passed. That Act incorporated the Lands Clauses Consolidation Act, 1845, and the Markets and Fairs Clauses Act, 1847, except s. L., and

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empowered the Duke of Bedford (which expression was defined as including the heirs and assigns of the then duke and also the owner or owners for the time being of the market) to construct and maintain a market house and market place, or market houses or market places in the parish of Tavistock on any part of the site marked on the deposited plan. The Act provided that after the completion of the new market places and market houses a market should not be held in Tavistock except in those market places and market houses.

Sect. XLII. of the Markets and Fairs Clauses Act, 1847, provided that: "The Undertakers may from time to time make such Bye Laws as they think fit for all or any of the following purposes: (that is to say) For regulating the use of the Market Place and Fair, and the Buildings, Stalls, Pens, and Standings therein, and for preventing Nuisances or Obstructions therein, or in the immediate approaches thereto; for fixing the Days and the Hours during each Day, on which the market or Fair shall be held . . . . provided always, that such Bye Laws shall not be repugnant to the Laws of that Part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act, or of any Act incorporated therewith."

In the year 1862 certain by-laws were made by the owners of the market, the Duke of Bedford and his trustees, of which the only one material for the present purposes was by-law No. 33, which was as follows: "No person shall sell or cause to be sold by Auction, Dutch Auction, or Public Competition any goods, articles or things whatsoever, without the consent of the Superintendent, Collector, Inspector or Surveyor of the Markets or his Assistant signified in writing under his hand. Every person offending against this Bye Law shall forfeit and pay for every offence any sum not exceeding Forty Shillings."

In 1912 the Tavistock Urban District Council Act (2 & 3 Geo. 5, c. LIV.), was passed, confirming the agreement which had been entered into between the defendant Council and the Duke of Bedford and his trustees for the purchase by the defendants from the Duke of the market, including the

various market places which had been constructed under the Act of 1859. Sect. 41 provided: "The Council may let for such term as they may think fit or for any days whether market or fair days or otherwise any of their market buildings or any stall standing shop bench site space of ground or other convenience or accommodation in their markets or fairs upon such terms and conditions as the Council think fit." There was no reference in that Act to the by-laws, so that the by-laws as they then existed did not in any way receive statutory confirmation.

It appeared from the evidence that at the time the by-laws were made sales by auction in the market were practically unknown, and that they did not come into use until the year 1895 or thereabouts. From that time there had been a steadily increasing number of sales of cattle by auction in the market, and at the present time sale of cattle by auction was practically the universal method of disposing of cattle at market. At first Messrs. Ward & Chown were the only firm of auctioneers who so disposed of the cattle on the market days. After a time Gale & Co., another firm of auctioneers, also sold cattle by auction at the market on market days; but with the exception of those two firms, from the time when sales by auction first became practically introduced down to April, 1921, no other firm of auctioneers ever sold cattle or sheep by auction in the cattle market on market days. When those two firms first began to act as auctioneers at the cattle market, the market owners who had purported to give themselves the right to object to sales by auction by by-law 33, only gave their consent to the two firms so acting on the terms that the firms paid a rent to the Duke of Bedford, who was then the market owner, and after 1912 to the defendant Council.

By a lease made on April 5, 1921, between the defendants of the one part, the two then partners in the firm of Ward & Chown of the second part, and Mr. Young, who was then the sole member of the firm of Gale & Co., of the other part, it witnesseth as follows: "In consideration of the rent and covenants hereinafter reserved and contained the Council

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under the powers of section 41 of the Tavistock Urban District Council Act of 1912 and every other power enabling it doth hereby demise unto the lessees all that the Market and Market Place and right of auction and market on the customary cattle market and fair days in the town of Tavistock aforesaid and in exclusion of all other persons at and upon the Auction Ring and sheep pens for Auction purposes delineated on the plan annexed to these presents and therein coloured pink together with the rights and privileges and emoluments appertaining to the said market (other than tolls of entry stallage and other tolls upon animals entering the market all of which tolls and stallage rents are reserved to the Council) To hold the same unto the lessees as joint tenants for the term of seven years from the 25th day of March 1921 paying therefor the yearly sum of 420*l.*"; provided always that "The above demise shall by no means operate to confer upon the lessees any right interest or estate in the premises except for and upon the customary cattle market and fair days in the said town to the end and intent that upon all other days the premises and place of market shall be and remain for the only proper use and behoof of the Council and its assigns lessees and other persons licensed or authorised by the Council." The lessees covenanted amongst other things: "Not without the written consent of the Council to exact or demand from any vendor a higher auction commission than 2*d.* in the 1*l.* upon the sale price of any beast sold." Then there was a covenant by the defendant Council: "not during the said term to demise to or permit to be used by any other person or persons as a market for the sale of cattle by auction upon cattle market or fair days any portion of the Tavistock Cattle Market or market place or any other portion of the market or market places vested in or controlled by the Council so long as the rent hereunder is duly paid and the covenants and conditions hereby imposed upon the lessees are duly performed and observed."

The plaintiff Nicholls strongly objected to the grant of this lease, and subsequently he and his co-plaintiff commenced this action in which, in addition to the declaration

above mentioned, they also claimed an injunction restraining the defendants from hindering, obstructing or prohibiting the sale by auction or otherwise by the plaintiffs or either of them in the market of any horses, cattle, etc., brought to the market upon payment of all proper market dues for tolls, stallage and other matters; and also a declaration that the defendants were not entitled to grant an exclusive licence to any auctioneer to sell by auction in the market, and that any agreement, lease or licence giving such a licence and limiting the number of persons allowed to sell by auction in the market was ultra vires and void as to such limitation.

Cunliffe K.C. and *Sir Denham Warmington* for the plaintiffs. It is sought to justify the lease under by-law 33, which was made under the powers of s. 42 of the Markets and Fairs Clauses Act, 1847, but we submit that by-law 33 is bad as being both unreasonable, and in restraint of trade. It is repugnant to the laws of that part of the United Kingdom where Tavistock is situate, within the meaning of s. 42. The approval of the by-law by the justices and the signature of the Home Secretary do not validate it. The Tavistock Urban District Council Act, 1912, did not mention the by-laws or afford them statutory recognition.

The defendants are seeking to place a restriction on the use of a free market for the buying and selling of goods, which every member of the public has a right to use for that purpose: *Austin* v. *Whittred* (1); *Scott* v. *Glasgow Corporation* (2); *In re Islington Market Bill* (3); Halsbury's Laws of England, vol. xx., Part I., p. 4; Part IV., p. 43. The defendants have set up no custom limiting the right of buying and selling.

To be good a by-law must be reasonable: *Kruse* v. *Johnson* (4), and we submit that this by-law is an unreasonable interference with the rights of the public. A by-law requiring a permit from the superintendent is bad: *Wortley* v. *Nottingham Local Board.* (5)

(1) (1747) Willes, 623.
(2) [1899] A. C. 470.
(3) (1835) 3 Cl. & F. 513.
(4) [1898] 2 Q. B. 91.
(5) 21 L. T. 582.

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Hughes K.C. and *A. C. Nesbitt* for the defendants. The by-law is not bad because in restraint of trade. A by-law prohibiting sale of cattle by auction before noon on the market day was held valid in *Collins* v. *Wells Corporation* (1) and restricting the use of sale rings for public auction sales was also good: *Scott* v. *Glasgow Corporation* (2); Halsbury's Laws of England, vol. xx., Part II., p. 23; Pease and Chitty on Markets, 3rd ed., pp. 98, 165. The plaintiff Nicholls is not excluded because he can have his cattle sold by either of the authorized auctioneers.

It is not unreasonable that no auction sales should take place without a permit. The defendants have acted bona fide and the Court will be slow to hold that a by-law is void for unreasonableness: *Slattery* v. *Naylor* (3); *Kruse* v. *Johnson* (4); *Attorney-General* v. *Hodgson.* (5) The by-law has been properly passed. The public is of common right entitled to frequent the market, but no person is entitled as of right to exclusive possession of any part of it without the consent of the person in possession of the soil: *Northampton Corporation* v. *Ward.* (6)

Cunliffe K.C. in reply.

ROMER J. stated the facts as above set out and continued: As will appear hereafter, I am not asked in this action (nor in the absence of the two lessee firms could I properly be asked) to determine either the exact meaning of that lease or the question whether it has validly conferred upon those two lessee firms the sole right of conducting sales by auction in so much of the premises forming the cattle market as are coloured pink upon the plan attached to the lease. The question that I am asked to determine is whether the defendants are entitled to prevent altogether any other auctioneer from selling by auction in the market on market days.

That lease having been granted, and indeed I think before

(1) 1 Times L. R. 328.
(2) [1899] A. C. 470.
(3) (1888) 13 App. Cas. 446.
(4) [1898] 2 Q. B. 91.
(5) [1922] 2 Ch. 429.
(6) (1745) 2 Stra. 1238.

the lease was actually sealed Mr. Nicholls took grave exception to it, because the result of the lease and the result of by-law 33, if the defendant Council comply with its covenants under the lease, is that every farmer who wants to sell his cattle (by cattle I always mean to include sheep, pigs and so forth) at the Tavistock market by auction will be obliged to employ one or other of the two firms. Accordingly, after some correspondence between the parties and their legal advisers, this action was started. Now, if, as the defendants assert, they can prevent any other auctioneer than the two lessee-auctioneers from conducting sales by auction in the cattle market and other parts of the market, or if they can prevent farmers and other vendors of cattle from employing for the purpose of sale by auction in the market any auctioneers other than the two lessee-auctioneers, it must be by virtue of by-law 33, to which I have referred. It is not suggested that there is in existence any other by-law which would justify that course of action on the part of the defendant Council.

I have, therefore, to consider whether that by-law is valid or invalid. If it be invalid then, as I understand the law, the plaintiff and Mr. Callaway can attend at the cattle market and other parts of the market at which cattle may be sold and dispose of cattle by auction except in those parts of the cattle market which may have been validly leased for the purposes of sales by auction to the auctioneer-lessees exclusively.

The by-laws had been made in the year 1862, and I cannot find that when the District Council acquired the market in the year 1912 or at any time since they ever considered the by-laws in detail. But inasmuch as no alteration in the by-laws took place Mr. Hughes has asked me to assume that the defendants adopted the by-laws as being in their opinion proper by-laws for the purpose of the regulation of the market. I am willing so to assume.

I have been referred to several authorities as to the principles to be observed by the Court in considering the validity or invalidity of by-laws passed by public representative

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bodies. I cannot say that I understand why, in considering the validity of a by-law relating to a commercial undertaking, such as a tramway or a market or electric or gas undertaking, any different principle should be applied where the by-law was made by a public representative body from that to be applied where the by-law was made by a private owner of that undertaking. But however that may be, I conceive that I cannot be wrong if in dealing with the making of a by-law relating to the market in pursuance of s. 42 of the Markets and Fairs Clauses Act, 1847, by a public representative body such as the defendants, I endeavour to follow the principles which were applied by the House of Lords in the case of *Scott* v. *Glasgow Corporation*. (1) For that was a case of a by-law made with reference to the use of a market by a public representative body under s. 42 of the Markets and Fairs Clauses Act of 1847. In that case the Glasgow Corporation were possessed of a wharf which had been constructed under the provisions of the Diseases of Animals Act, 1894, and was, therefore, by s. 32, sub-s. 3, of that Act a market within the Markets and Fairs Clauses Act of 1847. On part of their wharf there had been constructed certain sale rings for the purpose of sales by auction of cattle which were imported on the wharf, and with reference to those sale-rings the Glasgow Corporation had made a by-law in these terms: "The sale-rings shall be used only for public sales of cattle by auction on conditions of sale which shall be equally applicable to all bidders and buyers. The sale-rings shall not be used for private sales or for sales to any limited number of persons or for sales in which any class of the public are excluded from bidding or buying." So that it was a by-law which did not indeed purport to forbid sales by auction altogether, but only particular kinds of sales by auction, if they can be called sales by auction at all. Perhaps it would be not inaccurate to refer to them as sales by quasi-auction. The House of Lords had to consider whether that was a valid by-law, the validity of it being challenged by some fleshers of Glasgow

(1) [1899] A. C. 470.

who were very anxious that there should be held on the wharf sales by auction of cattle to which the public generally should not be admitted or at any rate at which the public generally should not be allowed to bid. The validity of the by-law was sustained by the House of Lords. I think it is very important to see on what grounds that by-law was held to be a valid by-law. Lord Halsbury L.C., who delivered the first speech, based his reasons for coming to a conclusion in favour of the by-law on this: that the by-law when strictly construed meant this and nothing more, that the places on the wharf which had been set aside as sale rings should be used solely for the purpose of sale by public auction. And so reading the by-law he came to the conclusion that it was valid. He says (1): "My Lords, I think it is important to notice that no one suggests any right in anyone to restrict their perfect freedom to sell to whom they please, but what has been done is to regulate the use of a part of a public market dedicated to public sales by auction and prevent its being made a place for private sale to a restricted class of customers. I am wholly unable to understand how it can be suggested that such a by-law controls other sellers or buyers as to the conditions upon which they shall sell or buy. What the by-law does is to prevent a particular class of buyers and sellers from appropriating to themselves accommodations intended for the public. I have a difficulty in even following the argument that the by-law in question purports to place any restriction upon any form of trade or free trade. There is hardly any market in which the regulating authority does not make, and properly make, some restrictions as to what particular form of trade shall be carried on at particular parts of the market, and it is impossible, as it appears to me, to say that such regulations are not within both the words and the spirit of the statute which authorises the local authority to make such by-laws as they think fit for regulating the use of the market-place and fair and buildings, &c., therein. Such by-laws certainly seem to regulate the use of the market; and in order to show that they are invalid, it seems to me to be

(1) [1899] A. C. 475.

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necessary to establish that they were repugnant to the laws of that part of the United Kingdom where they were to have effect. I cannot follow the reasoning that in dealing with the public sale by public auction there is anything contrary to the laws of Scotland in providing that at a public auction all mankind may bid, and that no auction shall be held in this particular place unless it is so held that all mankind may bid." Later on in his speech he referred to some observations which had fallen from Lord Kinnear in the Court below who, dissenting from the majority of that Court, had delivered a judgment against the validity of the by-law. He says (1): "Nor am I able to agree with the same learned judge, who points out that it is one thing to say that you may regulate the use of the market place so as to provide accommodation for buyers and sellers, although your regulations may confine the persons who make a particular kind of contract to one part of the market, and exclude these from others (which the learned judge appears to admit would be perfectly lawful), but he adds: 'It is a totally different thing to say that, irrespective of all conditions of accommodation or convenient use, you may forbid those who make use of the market to make contracts of which, on economical grounds, you do not approve, and to choose their own customers.'" Then Lord Halsbury goes on: "I agree entirely with the learned Judge in saying that what he puts as an equivalent of what is done here would be ultra vires of those who attempted to enact such a by-law; but my answer would be that the present by-law does nothing of the sort. What it does say is, you shall not use this particular place as a public auction unless it is a public auction, and you shall not use it so as to exclude the public from bidding here as at a public auction." I understand these passages of Lord Halsbury's judgment to mean this, that if the by-law had been a by-law which altogether prohibited selling in the market in the way in which the fleshers desired that cattle should be sold—namely, by quasi auction—then such a by-law would be bad. If that is so, how much more invalid would Lord Halsbury have thought

(1) [1899] A. C. 476.

a by-law which prohibited altogether a sale by public auction in any part of the market?

Lord Watson deals with the case solely on the ground that, in his opinion, the by-law amounted only to the dedication of a particular part of the market to sales of a particular sort, and comes to the conclusion finally, inasmuch as there is no obligation upon the market authority to provide any particular accommodation for sales in the way in which the pursuers in that case desired the cattle to be sold, that there was nothing invalid about the by-law.

Lord Davey took, I think, the same view. Lord Shand delivered a dissenting speech, a speech in which I do not think he enunciated any principles different from those on which the majority of the House of Lords were acting. The conclusion that he came to was that in substance the by-law did amount to a total prohibition in the market of any sales by quasi auction and was therefore bad, a conclusion to which, as I have already pointed out, Lord Halsbury himself would have come had he agreed with Lord Shand upon the meaning and effect of the by-law. Applying the principles of that case I am of opinion that a by-law that forbids sales by auction in any part of the market is invalid. The evidence which has been given before me shows that sales by public auction constitute at the present time the recognized method of now disposing of cattle at cattle markets, and to deny the right of vendors of cattle to take their cattle to Tavistock Market and to sell them there by public auction appears to me to be an interference with the common law rights of the public in public markets. Those rights are described by Lord Shand as follows (1): "The market is a public market"—referring to the market in that case—"and in such a market those who use it and have a right to use it on payment of the dues have the right, according to the common law affecting public markets, to fix the conditions on which they shall sell their goods as to price, for example, and as to the persons to whom they shall sell. This seems to me to be an incident of the common law, and that

(1) [1899] A. C. 490.

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it is repugnant to the law that the local authority should by regulation interfere with or abridge this right." In my judgment they also have a right according to common law affecting public markets to fix the manner in which the property shall be offered for sale and the manner in which the purchaser and the price shall be ascertained—namely, by public auction, if they so desire, more especially when, as I have already pointed out, a sale by public auction is the ordinary method by which sales of cattle are now carried out.

I ought now to refer to a case which was cited by Mr. Hughes: *Collins* v. *Wells Corporation.* (1) There is no doubt, I think, that this decision of a Divisional Court is an authority in favour of the validity of a by-law which prohibits the sale in a market of marketable goods by public auction. The by-law which had to be considered in that case was not a by-law which in terms prohibited altogether sales by auction of marketable commodities, but merely provided that no auctioneer should sell cattle by auction in the market before 12 o'clock on the market day. It appeared, however, in the evidence that the market for cattle was always over at 12 o'clock, so that in effect the by-law was a by-law which entirely prevented a sale of cattle by auction. The Court (consisting of Coleridge C.J. and A. L. Smith J.) came to the conclusion that the by-law was valid. The case apparently is only reported in The Times Law Reports, and even there is not reported very fully; but as reported, it is no doubt an authority in favour of the defendants in this case. As I read *Scott* v. *Glasgow Corporation* (2), however, the case of *Collins* v. *Wells Corporation* (1) is contrary to the principles there laid down, and, in my opinion, that case, although not expressly, is in effect overruled by the decision of the House of Lords.

I therefore hold that a by-law that altogether prohibits sales by auction in a public market is invalid. It is however pointed out by the defendants that the by-law in question in this case merely prohibits sales by auction without the

(1) 1 Times L. R. 328. (2) [1899] A. C. 470.

consent of the Superintendent, Collector, Inspector or Surveyor of the markets or his assistant. But I am of opinion that a by-law which prohibits the exercise of a common law right in a public market without the consent of the superintendent or other officer of the market authority is just as invalid as a by-law which prohibits the exercise of such right altogether. Although I should arrive at that conclusion apart from any authority, the conclusion is justified by one of the cases to which my attention was called in argument—that is the case of *Wortley* v. *Nottingham Local Board.* (1) In that case there was a by-law which prohibited the deposit of skins, which were a marketable commodity, in any part of Nottingham Market without the consent of the superintendent of the market. In point of fact the market authority had set aside, and it was held in the case they had lawfully set aside, a particular part of the market for the sale of skins. The by-law was held to be invalid because it extended not only to the streets which could no longer be used for the purpose of the sale of skins, but also to the part of the market set aside for the sale of skins. It, therefore, is a decision that in the case of a market for the sale of skins any prohibition against the sale of skins in that market, except with the consent of the superintendent, is bad and must be treated exactly as though it were a prohibition against the sale of skins in the market altogether.

Now if this by-law is, as in my opinion it is, an invalid by-law, being repugnant to the laws of that part of the United Kingdom in which Tavistock is situated, it follows that the defendant Council are not entitled to prevent the plaintiff and other farmers or Mr. Callaway and other auctioneers from selling their cattle in the market by public auction except upon such part of the cattle market place as may have been lawfully leased to the auctioneer-lessees exclusively.

I must therefore make a declaration such as that asked for by the plaintiff in para. 1 of the plaintiff's claim, limited, however, in this way; it must be limited to market days

(1) 21 L. T. 582.

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and, further, it must be limited by adding a proviso that nothing in the declaration is to prejudice any exclusive rights which the two lessee-auctioneer firms may have to conduct sales by auction in the premises coloured pink on the plan attached to the lease of 1921. Having made that declaration it appears to me at present quite unnecessary to grant any injunction. I will however reserve to the plaintiffs liberty to apply for an injunction if such a course should become necessary.

Solicitors for the plaintiffs: *Ellis & Fairbairn.*

Solicitors for the defendants: *Hancock & Willis, for W. J. Martyn Wivell, Tavistock.*

R. M.

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SORRELL *v.* SMITH.

[1922. S. 1627.]

Feb. 22, 23, 26, 27; *March* 28.

Action, Cause of—Combination to interfere with Freedom of Trade—Inducing withdrawal of Custom—No Intent to injure—Limits of Justification on the Ground of Protection of Trade Interests.

The plaintiff, a retail newsagent, transferred his custom from one wholesale newsagent to another—namely, from R. to W. The defendants, a committee consisting of the circulation managers of certain London daily newspapers, intervened at the request of R., and, in order to compel the plaintiff to return to R. as a customer, threatened to discontinue the supply of those newspapers which W. obtained directly from them, and also threatened to discontinue the supply of newspapers to S., a wholesale newsagent who supplied R. with some of his newspapers, unless S. ceased to supply W. with newspapers so long as W. supplied the plaintiff. In so acting the defendants were not actuated by spite to the plaintiff nor by any intent to injure him:—

Held, that any concerted interference with a man's right to carry on his business as he would, and to deal with such people as he thought fit, was a violation of a legal right which, if procured by threats and resulting in damage, was actionable, although there was no intent to injure, unless there was sufficient justification for the interference.

Held, also, that to justify an otherwise unlawful act on the ground of the protection or promotion of trade interests it must be shown that it was in the direct trade interest of the defendants to do the act in question.

WITNESS ACTION.

The following statement of the facts is taken from the judgment.

In this case the plaintiff, a retail newsagent, sues the defendants for an injunction in the following terms: "An injunction restraining the defendants or any or some of them in combination or otherwise from procuring or attempting to procure a breach of contract between the plaintiff and Messrs. Watson & Son or from interfering or attempting to interfere with the right of the plaintiff to enter into or continue such contracts or contractual relations with Messrs. Watson & Son as he would or generally with his right to carry on his business as he would."

The relevant facts are as follows: For the purpose of distributing the daily morning newspapers of London to the public three classes discharge their respective duties. The publishers produce the newspapers and supply them to the wholesale newsagents; the wholesale newsagents in their turn supply them to the retail newsagents; and they in their turn supply them to the public, but the firm of Messrs. W. H. Smith & Son (who are wholesale newsagents on an extremely large scale and obtain their supplies direct from the newspaper offices) in addition to supplying retailers direct, supply also wholesale agents who in turn supply retailers.

The trade union of the retail newsagents is the National Federation of Retail Newsagents, Booksellers and Stationers, divided into district councils and local branches. The wholesalers have their own Federation of Wholesale Newsagents. The interests of the publishers are looked after by a committee of the respective circulation managers of the London dailies, known as the Circulation Managers' Committee. The defendants are members of this committee, which is hereafter referred to as "the committee."

The retail federation advocates a policy known as the distance limit policy, which may be described as a policy of preventing newcomers from opening shops for the retail sale of newspapers in any area where the supply of newspapers to the public is already sufficiently provided for.

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All the events which led up to this action took place in 1922. Early in 1922 cases arose of newcomers which the London District Council of the retail federation held to come within the distance limit policy; that is to say, they were newcomers who commenced selling newspapers in an area already in the opinion of the London district council sufficiently equipped with retail newsagents. These newcomers, or some of them, were obtaining their supplies from a firm of wholesale newsagents called Ritchie Brothers of Shoe Lane. The London District Council secretary had failed to induce Ritchie's to stop supplies to these newcomers. On February 15 a special meeting of the branch presidents and secretaries of the London district was held, at which a resolution was carried, "that we ask one member from each branch to volunteer to withdraw his supplies from Ritchie on any of the ground he covers, and further action be taken to draw him into line with other wholesalers on the distance limit policy."

The plaintiff is a retail newsagent with his shop in Hoxton. He is a member of the Shoreditch branch of the retail federation, of which a Mr. Badkin is the secretary. The plaintiff had for some time been a customer of Ritchie's (to the mutual satisfaction of both) for his supply of daily papers and periodicals. His Sunday papers he obtained from Messrs. Vickers in Angel Court, Strand.

On the same February 15 a meeting was held of the Shoreditch branch, which the plaintiff attended. Mr. Badkin called for a volunteer, and the plaintiff responded to his branch's call, with the result that the plaintiff gave notice to Ritchie's to discontinue their supplies to him after Saturday, February 27. None of the newcomers who were being supplied by Ritchie's were within the area of the plaintiff's trade. At the same time the plaintiff cancelled his orders to Vickers. Since February 27 the plaintiff has been supplied with his papers (daily and Sunday) and periodicals by Watson & Son, wholesale agents of Dalston Lane. The plaintiff says that he went for his supplies to Watson's because they were more convenient to deal with than either Ritchie's or Vickers,

being considerably nearer to the plaintiff's shop. He also says that in fact he gets slightly better terms from Watson's than he got from Ritchie's, and that he consequently would suffer damage by returning to Ritchie's, and he has no desire to do so. I am satisfied on the evidence that what finally decided the plaintiff to leave Ritchie's was the call for volunteers at his branch.

Watson's obtained their supply of newspapers from W. H. Smith & Son but part of their supply of Daily Mails they obtained direct from the Daily Mail office.

On March 2 Ritchie's wrote to the secretary of the committee asking them to take the matter up. On Saturday, March 11, the committee communicated by telephone with Watson's. Mr. Leslie Watson (manager of Watson's) was told that he must stop the plaintiff's supplies at once or else Watson's supplies would be stopped. This telephonic communication was apparently made as the result of a meeting of a sub-committee of the committee, held on March 10, at which (after the defendant Valentine Smith of the Daily Mail had explained the situation) the secretary was, according to the minutes, instructed to telephone Watson's, "to the effect that if they continue to supply Mr. Sorrell after to-morrow (Saturday), supplies will be stopped." On the same Saturday the defendant Valentine Smith telephoned to Messrs. W. H. Smith & Son. He stated that he had requested Watson's to stop the plaintiff's supplies, that Watson's had demurred, and that his object in ringing up was to get W. H. Smith & Son to bring pressure to bear on Watson's to stop the supply to the plaintiff.

W. H. Smith & Son requested Mrs. Noyes (who owns the business of Watson's and is generally known as Miss Watson) to call and see them. She went on March 13. She requested the plaintiff to accompany her. He followed later accompanied by Mr. Badkin, but by the time they arrived Miss Watson had in fact left.

An interview took place between Mr. Wilson, the town trade manager of W. H. Smith & Son, and Miss Watson. Mr. Wilson told her what had happened on the Saturday,

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and that it would be in her interest to stop the supplies of the plaintiff, as W. H. Smith & Son were threatened by the circulation managers that W. H. Smith & Son would have to stop Miss Watson's supplies if she did not stop supplies to the plaintiff. He also told her that the circulation managers were having a meeting that day, that they were going to let him know the result and what he was to do, and he advised her to abide by the decision of the circulation managers which he would communicate to her. On the same morning the plaintiff and Mr. Badkin had an interview with Mr. Wilson and a Mr. Gottschalk. The plaintiff was told that they had trouble with the Daily Mail, that a serious message had reached them over the telephone, that unless he went back to Ritchie's there would probably be some trouble for him, and that W. H. Smith & Son might get their papers stopped. The plaintiff was strongly urged to go back to Ritchie's, not only for the sake of W. H. Smith & Son but for the sake of his own business. On the same day a meeting of the committee was held at which the defendant Valentine Smith explained the position of affairs, and reported the telephonic communications with Watson's and W. H. Smith & Son. It was resolved to write to Ritchie's advising them to make complaint to Mr. Birrell, the secretary of the wholesalers' federation. This was done, and W. H. Smith & Son informed Miss Watson that she could carry on as usual.

On March 15 Mr. Allen (a clerk in the town trade department of W. H. Smith & Son) saw the defendant Valentine Smith at his request. At that interview the defendant Valentine Smith stated that if Watson's did not stop supplying the plaintiff it would be a question of the supply to W. H. Smith & Son. In due course a letter of complaint, dated March 15, from Mr. Birrell reached the committee.

On March 20 a meeting of the committee was held, at which it was resolved that a letter in terms agreed be sent to Watson & Son, and that a copy thereof be sent to Mr. Birrell requesting him to notify his members that Ritchie's would serve the plaintiff in future. At the same time the committee telephoned to Miss Watson that she was to stop the plaintiff's

supplies after March 25. The letter in question was sent to Watson's. It was signed by the seventeen defendants to this action and is in the following terms: "Confirming a telephone message this morning by a representative of the Chairman of the above Committee, it is unanimously decided that you should be requested to give Mr. Sorrell notice to discontinue supplying him with the under-mentioned daily newspapers after Saturday next 25th March." On March 24 Watson's wrote to the committee stating that they would discontinue the plaintiff's supplies of daily newspapers after March 25. A question arose as to the plaintiff being entitled to a longer notice of discontinuance, and, on March 25, Watson's gave a notice of discontinuance of the plaintiff's supply of daily papers expiring on April 1.

The writ in this action was issued on March 28.

Sir John Simon K.C., *Maugham K.C.* and *Slesser* for the plaintiff. This case is exactly within Lord Brampton's words in *Quinn* v. *Leathem* (1) when he said: "The real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader in carrying on his business, and by so doing to invade his undoubted right, thus described by Alderson B. in delivering the judgment of the Exchequer Chamber in *Hilton* v. *Eckersley* (2): 'Prima facie it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice.'"

Interference with the right of a man to carry on his business by threats of coercive action, or by means of a combination, the object of which is not to further one's own business, but to interfere with another's business, is actionable: per Lord Lindley in *Quinn* v. *Leathem* (3); per Romer L.J. in *Giblan* v. *National Labourers' Union* (4); *Glamorgan Coal Co.* v. *South Wales Miners' Federation.* (5) The act of interference may be justified if done for the

(1) [1901] A. C. 495, 525.
(2) (1856) 6 E. & B. 52, 74.
(3) [1901] A. C. 495.
(4) [1903] 2 K. B. 600, 611, 612, 618.
(5) [1903] 2 K. B. 545, 573; [1905] A. C. 239.

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bona fide protection of the doer's own business: the *Mogul Steamship Case* (1); per Lord Parker in *Attorney-General of Australia* v. *Adelaide Steamship Co.* (2) The interference here is a threat by the defendants to penalise persons if they deal with the plaintiff. That is actionable: *Davies* v. *Thomas.* (3)

To induce a person by unlawful means not to deal with another is wrongful. The threats of coercive action by the defendants are unlawful means: *Pratt* v. *British Medical Association.* (4) Here the defendants threatened W. H. Smith & Son that they would stop their supply of newspapers if they continued to supply Watson & Son, who supplied the plaintiff. The defendants also threatened Watson & Son to stop the supplies they obtained directly from the defendants if they continued to supply the plaintiff.

Sir Ernest Pollock K.C., *Clauson K.C.* and *Dighton Pollock* for the defendants. A combination to do something which the defendants are legally entitled to do is not actionable. With regard to inducing persons not to deal with the plaintiff the law is that no matter whether the effect or intent be to injure another it is lawful to do these things to benefit oneself. The Court will not inquire whether the defendants' action was unreasonable; it is sufficient if it appears to have been taken bona fide in their own interests in the exercise of their trade: *Mogul Steamship Co.* v. *McGregor.* (5) Here the object of the defendants was not to injure the plaintiff, who could always have obtained his supplies from Ritchie's, but to further their own trade interests by having as many retailers as possible in a district. The defendants did this by protecting the wholesale newsagents who were victimised by the federation for supplying newcomers whom the federation considered superfluous. The defendants are entitled to refuse to sell to the plaintiffs. In *Scottish Co-operative Society* v. *Glasgow*

(1) [1892] A. C. 25.
(2) [1913] A. C. 781, 793.
(3) [1920] 2 Ch. 189.
(4) [1919] 1 K. B. 244.
(5) (1889) 23 Q. B. D. 598, 618, 619; [1892] A. C. 25.

Fleshers' Association (1) the defendants said "We will not sell you our hides unless you abstain from buying the plaintiff's hides. Yet it was held to afford no cause of action": per Atkin L.J. in *Ware's Case*. (2)

The fact that the benefit to the defendants may involve injury to another does not render the combination illegal: *Allen* v. *Flood* (3); *Ware's Case* (4); the *Mogul Case*. (5) If the object of the combination is not to injure others but to benefit the parties to it then it is not made unlawful by calling the act done in furtherance of the object a threat: *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (6); *Allen* v. *Flood*. (3) In *Pratt* v. *British Medical Association* (7) there was an intent to injure the plaintiff. That is not suggested here. A conspiracy to effect an illegal object or to effect a legal object by illegal means, if damage is thereby caused to an individual, is actionable. But there is nothing illegal here. The defendants were entitled to withdraw their custom, and the fact that they said they were going to do so does not become illegal because it is called a threat. In *Quinn* v. *Leathem* (8) there was a conspiracy to injure the plaintiff. Procuring a person to break his contract with the plaintiff is illegal: *Lumley* v. *Gye* (9); but there has been no breach here, the contract of Watson & Son with the plaintiff being terminated by due notice. *Ware's Case* (10), in which the principles laid down in *Quinn* v. *Leathem* (8) were applied, is an illustration of how far persons may go in the promotion of their trade interests.

From *Ware's Case* it appears that: (1.) A mere combination is per se unlawful if it has for its immediate purpose the hurt of another; (2.) if the object of a combination is the legitimate protection of trade interests the combination is lawful, even if it results in hurt to the plaintiff; (3.) the reasonableness of the action taken by the defendant to protect his trade interests

(1) (1898) 35 S. L. R. 645.
(2) [1921] 3 K. B. 40, 83.
(3) [1898] A. C. 1, 128, 164-5.
(4) [1921] 3 K. B. 40, 70.
(5) 23 Q. B. D. 598; [1892] A. C. 25.
(6) 35 S. L. R. 645, 650.
(7) [1919] 1 K. B. 244, 261.
(8) [1901] A. C. 495.
(9) (1853) 2 E. & B. 216.
(10) [1921] 3 K. B. 40.

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is not material if the action were in fact taken in order to do so; (4.) if you may lawfully do a thing it cannot be unlawful to say you are going to do it. It is submitted that here the action of the defendants was lawful, because it was done in order to protect their trade interests and had not for its immediate object the injuring of the plaintiff.

Maugham K.C. in reply. The ground of the decision in *Quinn* v. *Leathem* (1) was not that there was a conspiracy to injure, but that a violation of a legal right committed knowingly was a cause of action, and that it was a violation of a legal right to interfere with contractual relations recognized by the law if there were no sufficient justification for the interference. In *Quinn* v. *Leathem* (2) Lord Lindley agreed that *Allen* v. *Flood* (3) decided that an act otherwise lawful did not become actionable by being done maliciously, in the sense of proceeding from a bad motive, and with intent to harm another. If that is so how can *Quinn* v. *Leathem* (2) be explained on the ground of a conspiracy to injure? In *Attorney-General of Australia* v. *Adelaide Steamship Co.* (4) Lord Parker said that at common law no one could lawfully interfere with another in the free exercise of his trade or business, unless there were some just cause for the interference. In *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (5) the federation directed their members, in breach of contract, to cease work on a certain day. The federation so acted in the desire to keep up the price of coal, and with no ill-will towards their employers, but it was held that this was no justification for their action, and that an action lay for damages. There was no suggestion in the judgments that *Quinn* v. *Leathem* (1) was to be explained on the ground of malice. Lord Halsbury said: "It is a principle of law that people are presumed to intend the reasonable consequences of their acts." That is, malice or intent to injure is not necessary; you are supposed to intend the necessary consequences of your acts. Lord James said: "In *Quinn* v. *Leathem* (6)

(1) [1901] A. C. 495.
(2) [1901] A. C. 495, 510, 533.
(3) [1898] A. C. 1.
(4) [1913] A. C. 781, 793.
(5) [1905] A. C. 239, 244, 251.
(6) [1901] A. C. 495, 510.

Lord Macnaghten thus defined the law on the subject: 'A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference.'" It is clear that the House of Lords considered that a violation of a legal right committed knowingly, quite apart from spite or ill-will, was actionable. The decision in *Ware's Case* (1) was that the defendants acted as they did in the bona fide belief that it was for the protection of their trade interests—that is, there was sufficient justification for what, under the House of Lords' decisions, would otherwise have been wrongful. Here the defendants' only justification for attacking the plaintiff is that he is connected with the policy of the federation. The interference was not a refusal to supply the plaintiff. The defendants coerced W. H. Smith & Son and Watson & Son by threats so as to interfere with the rights and contractual relations of the plaintiff. The plaintiff's right has been knowingly violated, and it does not matter whether it was done maliciously or not. If there has been no violation of a right malice by itself is not a cause of action.

Cur. adv. vult.

March 28. RUSSELL J. stated the facts and continued: From the above recital the following facts emerge: (1.) The plaintiff at the request of his branch ceased to deal with Ritchie's because Ritchie's were supplying newcomers who, in the opinion of the retail federation, were persons to whom the distance limit policy should be applied. (2.) The defendants at the request of Ritchie's and in combination intervened, and for the purpose of securing that the plaintiff should return to Ritchie's as a customer brought pressure to bear on Watson's to discontinue their supplies to the plaintiff. (3.) This pressure was exerted on Watson's in part directly, by threatening to discontinue supplies to Watson's, and in part indirectly, through W. H. Smith & Son, by threatening

(1) [1921] 3 K. B. 40.

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to discontinue supplies to W. H. Smith & Son if they did not discontinue supplies to Watson's so long as Watson's continued to supply the plaintiff. In other words, the defendants combined to bring it about by threats that Watson's should refuse to deal with the plaintiff—that is, they combined to interfere, by coercion of Watson's, with the trade of the plaintiff, with his right to carry on his business as he would, and to deal with such people as he thought fit.

I will add this additional fact, of which I am upon the evidence satisfied, that in acting as they did the defendants were not actuated by any spite against the plaintiff, or by any intention or desire to injure him. They desired that he should take back his custom to Ritchie's; they were quite unaware of the fact, if it be the fact, that it was to the plaintiff's advantage, pecuniarily and otherwise, to deal with Watson's rather than with Ritchie's.

I must point out that in my view of the evidence no case here arises of the defendants combining to procure a breach of any contract between the plaintiff and Watson's. True it is that in the first instance Watson's were told to stop the plaintiff's supplies at once, that by the letter of March 22 an insufficient notice was to be given, and that an insufficient notice was, in fact, given. But this was put right by a letter from Watson's on March 25; no breach of contract in fact took place, and, under an undertaking given to the Court, Watson's have, in fact, continued to supply the plaintiff; and I have no evidence which would justify me in coming to the conclusion that the defendants now threaten or intend to procure, or attempt to procure, a breach of contract between the plaintiff and Watson's.

In these circumstances the defendants contend that although they induced Watson's to cease supplying the plaintiff, in part by stating that they would stop supplies to Watson's, and in part by stating that they would stop supplies to W. H. Smith & Son unless W. H. Smith & Son stopped their supplies to Watson's, these acts done or threatened are all merely withdrawals of custom, and are acts which any individual is entitled to do, even though damage to the

plaintiff results. They contend that acts which if done by an individual would not afford a cause of action, equally afford no cause of action if done by persons in combination, unless so done with the intent to injure the plaintiff. The actual motive, if there be no such intent to injure, is immaterial. In other words, they assert (1.) that an otherwise lawful act done in combination only becomes unlawful if so done with intent to injure another; and (2.) that this essential feature, intent to injure, is absent from the present case. This view of the law is based upon the case of *Ware* v. *Motor Trade Association* (1); not so much upon the actual decision in that case as upon statements to be found in various passages in the judgments of the Lords Justices.

On the other hand the plaintiff contends that the true view of the law is this: That any interference in combination with a man's right to carry on his business as he wills and to deal with such people as he thinks fit is a violation of legal right, which, if procured by threats and resulting in damage to him, is actionable if there be no sufficient justification for the interference. For that proposition they rely on many citations from speeches in cases decided in the House of Lords. It is my task to choose between these rival contentions, and I find myself in this unenviable position, that my decision, whatever it may be, must run counter to views expressed by members of higher tribunals.

In *Ware's Case* (1) the actual decision was that the act complained of, the publication of the plaintiff's name in a stop list, was done by the defendants bona fide in the protection of trade interests and therefore was not unlawful. The decision was probably correct in any view of the law. Acts which might have afforded a cause of action, if no justification for them had existed, were held to afford no cause of action, there being in fact justification. Bankes L.J. rejects any suggestion that there existed any conspiracy to injure the plaintiffs, by which I understand him to mean any combination to do an act with the object and intention to injure another. He says the plaintiffs' case could only rest

(1) [1921] 3 K. B. 40.

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upon there being a combination to do some act by unlawful means, which act would in fact injure him. As I read his judgment, his view was that the question to be considered was, were the means—namely, putting the names on the stop list—lawful? He refused to consider whether such means could be described as threats or coercion. He pointed out that in each of the cases, *Quinn* v. *Leathem* (1); *Pratt* v. *British Medical Association* (2); the *Mogul Case* (3); and *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (4), there existed combination, and threats and coercion by the combination, but that the real distinction between the first two cases and the last two cases lay in the fact that in the first two cases the object of the combination was to injure another. Thus he makes the existence of an intent to injure the test of liability. In the case before him he held that there was no intent to injure; the object of the combination was protection of trade interests.

Atkin L.J. discussed the matter with more elaboration, but in the result his view in this respect is the same. Early in his judgment he indicates his opinion that the absence of intention on the part of the defendants to injure the plaintiffs is the governing factor in the case. He states (5) that it is illogical to start with the assumption that an interruption of the power of a man to do as he pleases within the law is prima facie a legal wrong, which in every case needs justification, and that the true question is, was the power interrupted by an act which the law deems wrongful? He comes to the conclusion (1.) that the plaintiffs were wrong in their contention that a combination, which in seeking to protect their trade interests interferes with a man's right to carry on his business as he pleases, can only justify such interference by showing that the steps taken were reasonably necessary to protect their interests; and (2.) that the plaintiffs to succeed must show that the acts done or threatened by the defendants were unlawful. He then (6) considers the plaintiffs' claim to

(1) [1901] A. C. 495.
(2) [1919] 1 K. B. 244.
(3) [1892] A. C. 25.
(4) 35 S. L. R. 645.
(5) [1921] 3 K. B. 79.
(6) [1921] 3 K. B. 79–91.

succeed on the ground that the acts done by the defendants were unlawful—namely, threats to coerce third parties not to deal with the plaintiffs. He says that he knows of no cases where injury done by threat of a lawful act has been held to be in itself actionable; but that the added element of an intention to injure the plaintiff may make a difference. In his opinion any man has a right to intimate to a third person that he intends to do something which he lawfully may do, and that it is immaterial whether the intimation is expressed in terms of hostility or not, and whether or not it is an irresistible inducement to the addressee to act upon it. This in his view is equally true of the case of an individual or a combination in the absence of any intention to injure. It is true of the case of an individual, even though an intention to injure exist; but it is not true of the case of a combination with an intention to injure. He sums up the matter in these words (1): "It appears to me to be beyond dispute that the effect of the two decisions in *Allen* v. *Flood* (2) and *Quinn* v. *Leathem* (3) is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another." I think there can be no doubt that according to the views of Bankes and Atkin L.JJ. no action would lie against the defendants in the present case in the absence of an intention on their part to injure the plaintiff, these views being based upon the proposition that intent to injure is the foundation of the cause of action. If this be a correct statement of the law the plaintiff here must fail. This view, however, is not in accordance with opinions expressed in the House of Lords, nor is it in accordance with the opinion of Scrutton L.J. as expressed in *Ware's Case*. He says (4) that conspiracy is actionable when the end is unlawful and causes damage. He then proceeds as follows: "It is said that the end is

(1) [1921] 3 K. B. 90, 91.
(2) [1898] A. C. 1.
(3) [1901] A. C. 495.
(4) [1921] 3 K. B. 69, 70.

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unlawful if it is to cause damage to another. My comment on that is that it is not true," and he gives many illustrations to show that it is not true. He, according to the language used, repudiates the notion that intent to injure is the foundation of the cause of action. The real question according to him is : Have you a right to do the act complained of ? He further indicates his view, on the subject of threats, that it cannot be unlawful to say you are going to do something which you may lawfully do : but notwithstanding this, and notwithstanding his view that intention to injure made no difference, he felt himself bound by *Quinn* v. *Leathem* (1), which he considered to have decided that combinations which were not intended to secure trade interests but were intended to injure were actionable. All three Lords Justices concur in the view that *Quinn* v. *Leathem* (1) decided that a combination to do some act with intent to injure was actionable. Bankes and Atkin L.JJ. concur in the soundness of that view ; Scrutton L.J. did not.

Let me now refer to some of the passages in the House of Lords cases. *Quinn* v. *Leathem* (1), as I read the judgments, decided, amongst other things, that a combination of two or more to induce by threats a man's customers not to deal with him was, if damage resulted, actionable, unless justification existed. The decision did not, in my opinion, depend upon the existence in the combination of an intent to injure. That was not the view of many of the Lords who took part in the debate. It is true that the jury in that case had found that the defendants had acted maliciously, and that Lord Halsbury interprets this as meaning " with malice in order to injure the plaintiff " ; but his judgment appears to me, from what he says on p. 507, to rest on there having existed a conspiracy which by means of threats interfered with the plaintiff's legal rights to his damage without sufficient excuse. On the preceding page he had pointed out that the two points in *Allen* v. *Flood* (2) which distinguished it from *Quinn* v. *Leathem* (1) were absence of threats and absence of conspiracy or combination. Lord Macnaghten did not base his judgment

(1) [1901] A. C. 495. (2) [1898] A. C. 1.

on the existence of an intent to injure. He seems to me clearly to show his opinion that intention to injure is irrelevant. He does so when he suggests a form which the headnote in *Allen* v. *Flood* (1) might have assumed; he does so again when he points out how *Allen* v. *Flood* (1) swept away the erroneous view of Lord Esher, expressed in *Temperton* v. *Russell* (2), that the defendants' liability depended on motive or intention. His judgment is based on the view that, quite apart from intent or motive, an interference with contractual relations if knowingly committed is a cause of action unless sufficient justification exists. In the case before him he found that the defendants conspired to do harm to Munce to compel him to do harm to Leathem for a purpose which could not amount to sufficient justification. The conspiracy to do harm to Munce was really the conspiracy to threaten Munce, which resulted in Munce ceasing to deal with Leathem to the damage of Leathem. Lord Shand's judgment certainly appears to be founded on the acts having been done by the combination with the intention to injure the plaintiff. Lord Brampton, at pp. 523–4, accepts to the full the proposition that the intention with which an act is done will not render it actionable. The basis of his judgment cannot, therefore, have been the existence of an intent to injure, even though in his indignant peroration he describes the conspirators as actuated by malevolence. At p. 525 he states what I conceive to be the basis of his judgment—namely, that the real cause of action in the case was an unlawful conspiracy to molest the plaintiff in carrying on his business, meaning, as I understand him—for at p. 526 he rests his judgment on principles expressed by Sir William Erle—that any combination to interfere with a person in carrying on his business is actionable as a violation of a man's right to trade as he wills, unless the acts done can be justified as an exercise of a similar right by the persons who do the acts. Lord Lindley in clear terms accepts the view that an act otherwise lawful does not become actionable by being done with intent to injure another; but in considering the plaintiff's rights and whether

(1) [1898] A. C. 1. (2) [1893] 1 Q. B. 715.

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the defendants' conduct infringed those rights he does appear to lay stress on the defendants' intention to injure the plaintiff. Taking his judgment, however, as a whole his opinion appears to me to be that a conspiracy to interfere with A.'s right to trade as he wills, by threats to others, is actionable unless justification exists, and that justification was negatived by the intention to injure the plaintiff. From the judgments of Lords Halsbury, Macnaghten, Brampton and Lindley, it is, in my opinion, correct to say, as far as they were concerned, (1.) that *Quinn* v. *Leathem* (1) did not rest on the view that intention to injure was the foundation of the cause of action, and (2.) that *Quinn* v. *Leathem* (1) did rest on the view that a combination to interfere with a person's right to trade as he wills, by means of threats, is actionable if it results in damage to the plaintiff, unless sufficient justification exists. Further, it appears to me that other opinions expressed in the House of Lords in other cases proceed upon the same footing. I need not dwell on them at length. In *Attorney-General of Australia* v. *Adelaide Steamship Co.* (2) Lord Parker states that at common law no one can lawfully interfere with another in the free exercise of his trade or business, unless there exist some just cause or excuse for such interference. In *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (3), which no doubt was a case of procuring a breach of contract, Lord Halsbury says it was a case of the infliction of an unlawful injury on persons entitled to the services of their workmen, which is an actionable wrong unless is can be justified. Lord Macnaghten emphasises the fact that it is settled that malice in the sense of spite or ill-will is not the gist of the action. Lord James repudiates the notion that the existence of malice is essential to the action, and, in addition to quoting Lord Macnaghten's statement of the law in *Quinn* v. *Leathem* (4), relies upon what Bowen L.J. said in the *Mogul Case* (5)—namely, "Intentionally to do that which is calculated in the ordinary course of events

(1) [1901] A. C. 495.
(2) [1913] A. C. 781, 793.
(3) [1905] A. C. 239, 250.
(4) [1901] A. C. 495, 510.
(5) 23 Q. B. D. 598, 613.

to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse." Reference may also be made to what Lord Macnaghten said in *Allen* v. *Flood* (1): " . . . . it would seem to follow that, provided the violation is committed knowingly, it cannot matter whether the thing is done maliciously or not. . . . . I should be disposed to hold that if a right has been knowingly violated an allegation of malice is superfluous, and that if there has been no violation of any right, malice by itself is not a cause of action. I cannot, therefore, agree with the late Master of the Rolls in thinking that the act complained of was 'wrongful' because it was 'malicious,' and that if there be a malicious act, and loss resulting from that act, it does not matter whether there has been a violation of right or not."

In my opinion, in deciding the present case, I ought to follow the views which, according to my understanding, have been expressed in the House of Lords rather than the views expressed in the Court of Appeal, hoping that the parties to this litigation may ultimately obtain from the highest tribunal a clear exposition of the law, which, though it may not reconcile all the decisions, will render less difficult the solutions of such questions in the future.

In this case I hold upon the evidence that the defendants combined to interfere with the plaintiff's right to trade as he willed by means of threats; and I hold upon the authority of *Quinn* v. *Leathem* (2) that unless sufficient justification exists that is actionable if it results, or would result, in damage to the plaintiff. Two questions remain for consideration. The first is whether the event which the defendants combined to bring about by threats—namely, the return of the plaintiff to Ritchie's as a customer—would, if brought about, have caused damage to the plaintiff? The evidence is not very strong on the point. The event has in fact never occurred. The evidence however does establish that Watson's terms of supply were pecuniarily advantageous to the plaintiff as compared with Ritchie's terms. It also establishes that Watson's

(1) [1898] A. C. 1, 154. (2) [1901] A. C. 495.

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premises, being much nearer to the plaintiff's shop than Ritchie's, are more convenient for the purpose of the plaintiff's obtaining extra supplies when suddenly or unexpectedly required; and it seems to me that apart from the mere element of convenience it must follow that less expense would be incurred in sending a messenger the shorter rather than the longer distance. The evidence justifies me in holding, as I do, that the event which the defendants combined to bring about would, if their combination was successful, cause damage to the plaintiff. The second question is a difficult one. Did sufficient justification exist for what the defendants did? My task was not simplified by the evidence given on behalf of the defendants. Throughout this matter the leading spirit on behalf of the committee was Mr. Valentine Smith of the Daily Mail. He it was who brought the pressure to bear to secure the object which the committee had in view. He apparently shares the opinion of Falstaff that the better part of valour is discretion, in the which better part he refrained from entering the witness box. Mr. Moseley of the Morning Post, whose newspaper does not apparently circulate in Hoxton, was called to put forward the views of the committee and explain and justify their action in the matter. He was the only member of the committee who was called, and I must take his evidence as the evidence of the committee. His evidence in many respects was neither intelligent nor intelligible. In some of his answers he clearly states that the committee's view, and presumably their reason for acting as they did, was that all distance limit disputes should be decided by the committee and by no one else. In other parts of his evidence he states more than once that their reason for interfering in this particular case was because they considered Ritchie's were being victimised. This can only mean that they considered that Ritchie's were being made to suffer improperly, improperly, that is to say, because the particular newcomers whom they were supplying were not persons to whom the distance limit policy was on the merits properly applicable. But there is no trace on the evidence, or in the documents, of the committee ever having considered

the merits, or having ever been informed where the newcomers had established themselves, or whether the areas whither they had gone were already over equipped or under equipped with retail newsagents. The only conclusion which I must draw is that the only excuse or justification suggested for the acts of the committee is the desire on their part to have the final voice in each case as to the application of the distance limit policy. It is not that they object to the distance limit policy in principle, but they claim to decide whether or not it shall be applied. To quote the effect of the answers Nos. 1499 and 1500 "the Committee claim the right of imposing their opinion, and object to the Federation imposing their opinion, as to how many retailers there should be." Is this a sufficient justification? The committee had no relations direct or indirect with the plaintiff. There is no suggestion on the evidence that the act which the plaintiff had done—namely, changing his wholesale agent—affected in any way the trade interests of the defendants. Whether the plaintiff's wholesale agent was A. or B. would not increase or diminish the sale of the defendants' papers. It might indeed well be that the greater convenience of Watson's for the purpose of emergency supplies would result in increased sales. Again it might well be that if the newcomers in question had invaded areas already sufficiently equipped with retail agents, the plaintiff's action, if it had ultimately resulted in the retirement of the newcomers, might have proved beneficial to the defendants. They made no inquiry as to how their trade interests might be affected. They acted simply for the purpose of establishing their claim, as against the federation, of having the sole voice in distance limit questions.

Nor is it suggested that in exercising his undoubted right to change his wholesale agent the plaintiff was taking a step in any way directed against the defendants.

In my opinion in order to justify an otherwise unlawful act on the ground of protection or promotion of trade interest, you must show, as was the fact in *Ware's Case* (1), that it is for your direct trade interest to do the act in question. That

(1) [1921] 3 K. B. 40.

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is not the case here. It is not enough to suggest that there is some dispute between you and a third party, such as existed here between the federation and the committee, and that the act complained of will or may assist you in that dispute. There was no dispute between the plaintiff and the committee; and although the plaintiff was a member of the federation against which the committee desired to establish a right to decide distance limit cases, that fact does not justify the violation by the defendants of the plaintiff's right to select the persons from whom he shall obtain his supplies.

In the result the action succeeds.

There will be an injunction restraining the defendants, and each of them, from interfering or attempting to interfere with the right of the plaintiff to enter into or continue such contracts or contractual relations with Watson's as he wills.

The defendants must pay the costs of the action.

Solicitors: *Shaen, Roscoe, Massey & Co.; Lewis & Lewis.*

J. B. B. M.

C. A. 1922 P. O. LAWRENCE J. *Nov.* 2, 8. C. A. 1923 *Feb.* 22, 23.

In re BURNYEAT.

BURNYEAT *v.* WARD.

[1922. B. 1959.]

Will—Construction—Gift to Children of Brothers and Sisters—Codicil—Substitutional Gift to larger Class—Testator's Parents living—Substitutional Gift void for Remoteness—Whether Gift in Will could take Effect—Dependent Relative Revocation.

Testator devised and bequeathed his residuary real and personal estate to his trustees upon trust to pay the income thereof to his wife for life and after her decease in trust for his children as therein mentioned, and if there should be no such child then the testator gave to his wife a power of appointment among the children of his brothers and sisters, and in default of such appointment and so far as any such appointment should not extend he gave the residuary trust funds to all the children of his brothers and sisters. By a codicil to his will the testator, after declaring that the life interest given to his wife by his will should be terminable on her remarriage unless such remarriage should be with a natural-born British subject, revoked the power of appointment given to his wife and declared that after her death his trustees should stand

possessed of his residuary trust funds in trust for all or any of the children or child of his brothers and sisters who should be living at the death of his wife or born at any time afterwards before any one of such children for the time being in existence attained a vested interest and who being a son or sons attained the age of twenty-one years or being a daughter attained that age or married, if more than one in equal shares. The testator died without issue and left personal estate only. At the time of his death the testator's father and mother were still living, and were both of the age of about sixty-six years. The father had subsequently died. The testator's widow had remarried with a person who was not a natural-born British subject. All the testator's brothers and sisters were over twenty-one years of age at the date of the testator's will and all had children, one of whom was born after the remarriage of the testator's widow :—

Held, by P. O. Lawrence J. (1.), that the gift in the codicil was void for remoteness ; and (2.) that there was no express revocation of the gift in the will, and therefore the gift in the will in favour of the nephews and nieces prevailed.

On appeal :—

Held, by Lord Sterndale and Warrington L.J. (Atkin L.J. dissenting), affirming the decision of P. O. Lawrence J. on the first point, that the gift in the codicil was void for remoteness.

Held, also, by the whole Court (reversing the decision of P. O. Lawrence J. on the second point), that the original gift in the will was not restored. The two gifts clearly could not stand together, and that being so, the gift in the codicil operated as a revocation of and substitution for the gift in the will. The gift in the codicil being incapable of effect being given to it, there was no alternative gift to which effect could be given.

Held, therefore, by the majority of the Court that there must be a declaration that, in the events which had happened, the testator died intestate as to his residuary personal estate.

Morley v. Rennoldson, [1895] 1 Ch. 449 and *In re Bernard's Settlement*, [1916] 1 Ch. 552 distinguished.

ORIGINATING SUMMONS.

William John Dalzell Burnyeat by his will dated May 13, 1915, after appointing executors and trustees thereof, and making divers pecuniary bequests, devised and bequeathed all his real and personal estate unto his trustees upon trust for conversion into money and, after payment of debts funeral and testamentary expenses, upon trust to invest the proceeds and to pay the income to his wife, during her life, and after her decease in trust for his children as therein mentioned, and if there should be no such child then the testator gave to his said wife a power of appointment among the children of his brothers and sisters as therein mentioned, and in default

C. A. 1922 BURNYEAT, *In re.* BURNYEAT *v.* WARD.

of such appointment and so far as any such should not extend, he gave the residuary trust funds "to all the children of my said brothers and sisters."

The testator made a codicil to his will, dated April 23, 1916, the material part of which was as follows: "I declare that the life interest given to my said wife by my said will shall be terminable on her remarriage unless such remarriage shall be with a natural-born British subject. I revoke the power of appointment among the children of my brothers and sisters given to my said wife by my said will and I declare that after her death my trustees shall stand possessed of the residuary trust funds in trust for all or any of the children or child of my brothers and sisters who shall be living at the death of my wife or born at any time afterwards before any one of such children for the time being in existence attains a vested interest and who being a son or sons attain the age of 21 years or being a daughter or daughters attain that age or marry if more than one in equal shares."

The testator died on May 7, 1916, without issue.

The age of each of the testator's parents at the date of his will was about sixty-six; and both survived him. His father, William Burnyeat, was consequently his heir at law and next of kin. William Burnyeat died on June 28, 1921, having by his will appointed executors, who were some of the defendants in these proceedings.

The testator also left two brothers and two sisters him surviving. All the testator's brothers and sisters had children —namely, the infant defendants—one of whom, the defendant Philip Ponsonby Burnyeat, was born since the remarriage of the testator's widow. All the brothers and sisters of the testator had attained the age of twenty-one years at the date of his death.

The testator's widow who before her marriage with the testator was a German subject, in February, 1921, married a Dutch subject named Manta Meindert Schim van der Loeff, and thereupon her determinable life interest in the testator's residuary estate came to an end.

In these circumstances the present trustees and executors

of the testator's will took out this summons for the determination of the following questions :—

1. Whether on the true construction of the will and codicil and having regard to the remarriage of the testator's widow to an alien the gift of the testator's residuary real and personal estate in trust for the children or child of his brothers and sisters who should be living at the death of his widow took effect upon her remarriage or whether there was a partial intestacy between her remarriage and her death.

2. Whether the trust in favour of the children or child of the testator's brothers and sisters was void for remoteness.

3. If the trust was a valid trust and took effect on the remarriage of the testator's widow, whether the class of children to take was now to be determined when the eldest for the time being attained the age of twenty-one years or being female married before attaining that age or whether the class remained open until the death of the testator's widow.

4. Whether if the class was determined when the eldest for the time being of the said children attained the age of twenty-one years or being female previously married each member of the class would be entitled to be paid his or her share on attaining that age or in the case of females on their earlier marriage.

5. Whether the intermediate income of the real and personal estate between the remarriage of the widow and the determination of the class of children went along with the corpus and if so whether it was available for maintenance or how otherwise the same ought to be dealt with.

The summons was heard before P. O. Lawrence J. on November 2 and 8, 1922.

Sir Arthur Underhill for the trustees.

Jenkins K.C. and *J. E. Harman* for nephews and nieces living at the remarriage of the testator's widow. The class of the children of the testator's brothers and sisters referred to in the will is not left open until any child should attain twenty-one, but would be closed on the death of the widow,

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and therefore does not offend the rule against perpetuities. The testator's brothers and sisters mentioned in the will are his brothers and sisters in existence at the date of the will. He had in mind not brothers and sisters who might be born after his death, but those only whom he knew. It is significant that his parents were at that time sixty-six years of age. Besides, the testator was not providing for brothers and sisters, but for their children. The cases show that when there is an ambiguity in the language used by the testator, regard may be had to surrounding circumstances: *In re Mervin.* (1) In case it should be held that the gift in the codicil to the children of the testator's brothers and sisters who should be born at any time after the death of his widow offends the rule against perpetuities, the gift to nephews and nieces living at the death of the widow take vested interests liable to be divested in favour of additional nephews and nieces coming into existence after her death: and if the gift to after-born nephews and nieces should be held void for remoteness, at any rate the gift may be split so as to give effect to the gift to those nephews and nieces who were living at her death. If the whole gift in the codicil is void, then there is no intestacy, but the gift in the will stands. The testator by his codicil revokes the power of appointment and the gift in the will remains. There is no implication of an intention to revoke the whole of the gift in the will: *Morley* v. *Rennoldson* (2); *Baker* v. *Story* (3); *In re Fleetwood.* (4)

The testator having by his codicil revoked the life interest given by his will to his widow, the result is that if the gift to his nephews and nieces stands, then that gift will be accelerated by the remarriage of the widow. The reference to the death of the widow in the will must be read as a reference to her remarriage: *Jull* v. *Jacobs* (5); *In re Townsend's Estate* (6) is distinguishable.

[They also cited *Bainbridge* v. *Cream.* (7)]

(1) [1891] 3 Ch. 197.
(2) [1895] 1 Ch. 449.
(3) (1874) 23 W. R. 147.
(4) (1880) 15 Ch. D. 594, 609.
(5) (1876) 3 Ch. D. 703.
(6) (1886) 34 Ch. D. 357.
(7) (1852) 16 Beav. 25.

E. W. Lavington for a nephew born after the remarriage of the testator's widow also supported the argument that the gift in the codicil to the children of the testator's brothers and sisters was not void for remoteness.

Owen Thompson K.C. and L. F. Potts for Mrs. Van der Loeff were not called upon to argue the question of remoteness. If the gift in the codicil is void for remoteness there is an intestacy. There is a complete revocation by the codicil of the gift in the will. The codicil revokes the widow's power of appointment and then proceeds to substitute an entirely fresh gift to nephews and nieces in place of the gift in the will. That substituted gift having failed on the ground of remoteness, the result is intestacy: In *In re Fleetwood* (1) there was no revocation of the original gift. Here the gift in the codicil is to a class different from the class described in the will. The gifts are so inconsistent that they cannot stand together: *Baker* v. *Story*. (2) In *Morley* v. *Rennoldson* (3) it was possible to construe the two gifts together.

[They also cited *In re Warner*. (4)]

Shebbeare for the executors of the testator's father.

P. O. LAWRENCE J. The first question on this application is whether the trusts declared by the codicil in favour of the children of the testator's brothers and sisters are void for remoteness. The proper method of approaching this question is first to ascertain the meaning of the language used by the testator irrespective of the rule against perpetuities, and then to see whether so construed the bequest transgresses the rule. Further, it has to be borne in mind that in applying the rule against perpetuities possible and not actual events must be considered, and, therefore, a gift will not be good, although as a matter of fact it vested within the proper time, if at the time of the death it might possibly not so have vested. Also the fact that a woman is past child-bearing is not to be considered in applying the rule, and therefore the chance of such a woman having children is a possible

(1) 15 Ch. D. 594.
(2) 23 W. R. 147.
(3) [1895] 1 Ch. 449.
(4) [1918] 1 Ch. 368.

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event in determining whether a gift is void for remoteness or not.

In the present case the testator by his codicil has given the residue of his estate after a limited interest to his wife to the children of his brothers and sisters, such children to be living at the death of his wife or any time afterwards and the gift being contingent on those children attaining twenty-one or being daughters attaining that age or marrying.

The testator's parents were both alive at the date of his codicil and of his death. The chance of their having further children therefore was a possible event which has to be considered in applying the rule against perpetuities and determining whether the gift is void for remoteness or not. The only way in which, in my opinion, the gift can be saved from transgressing the rule against perpetuities is if it can be so construed as to confine the expression "my brothers and sisters" to those brothers and sisters who should be living at the date of the codicil or at the date of the death of the testator, or so as to confine the children of those brothers and sisters to such children as should be living at the date of the death of the testator's widow. In my opinion it is impossible to construe the language of the codicil as being so limited in either respect. It is, in my judgment, difficult to see how a child of an after-born brother or sister of the testator could be excluded on the fair construction of the language of the codicil from the class of children mentioned in the bequest, and the codicil expressly states that the class is to include any child born after the death of the testator's widow, with the result that, in my judgment, the gift in the codicil need not necessarily vest within the proper time, and is consequently void for remoteness.

The next question is whether, on the assumption that the gift in the codicil is void, there is an intestacy, or whether the original gift to the children of the testator's brothers and sisters contained in the will prevails. It is not disputed that the gift to them in the will is perfectly good. The solution of this question, in my opinion, depends upon whether the codicil ought to be construed as completely revoking the

gift in the will or as only modifying it to the extent necessary to give effect to the dispositions contained in the codicil. In the former event there will be an intestacy and in the latter event the gift in the will prevails. In my judgment it is apparent from the wording of the codicil that the main object of the testator in making his codicil was to prevent his wife, if she were to marry a man who was not of British nationality, from herself enjoying the life interest which he had given her in his property, and from having any power of selection amongst his nephews and nieces. It is true that he has varied the ultimate gift to his nephews and nieces by including those who may have been born after his wife's death and by making their interests contingent on their attaining twenty-one or marrying. Undoubtedly therefore the testator has created new interests by his codicil and has also excluded from the benefits of his will any nephews or nieces who might die before attaining twenty-one or marrying. But it is to be observed that there is no express revocation in the codicil of the gift to the nephews and nieces contained in the will, and in this respect the gift to those nephews and nieces in the codicil differs from the earlier part of the codicil when dealing with the interest of his wife and with the power of appointment conferred upon her which were in terms revoked.

On the whole I have come to the conclusion that there is sufficient appearing on the face of the codicil to justify the Court in holding that the testator did not intend to revoke the gift in the will in favour of his nephews and nieces unless the modified provisions contained in the codicil could take effect, and consequently inasmuch as those modified provisions fail I am of opinion that the gift in the will prevails.

The result of that is that the codicil in the events which have happened operates to determine the life interest of the widow from the date of her marriage and deprives her of any power of appointment amongst the nephews and nieces of her husband, but does not operate to deprive the testator's nephews and nieces of the interests which are given to them by the will.

The only remaining question is what is to happen to the

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income of the residuary estate in the interval between the remarriage of the testator's widow and her death? Is that income undisposed of or are the interests of the nephews and nieces accelerated? In my opinion the life estate of the widow having been determined by the forfeiture clause contained in the codicil the rule that the gift in remainder will be accelerated, even though this may alter the members of the class, applies to the present case. Accordingly I hold that the nephews and nieces in existence at the date of the marriage of the widow take the residue and there will be declarations accordingly.

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The widow appealed. There was also a cross-appeal by two of the nephews of the testator, one of whom had been born before and one since the remarriage of the widow. The appeal and cross-appeal were heard on February 22 and 23, 1923.

The appeal was first argued.

Owen Thompson K.C. and *L. F. Potts* for the appellant.

Jenkins K.C. and *J. E. Harman* for the nephews and nieces other than the appellants on the cross-appeal.

E. W. Lavington for the appellants on the cross-appeal.

Sir Arthur Underhill for the trustees of the testator's will.

Shebbeare for the executors of the will of the testator's father.

The arguments were substantially the same as those used in the Court below.

The following additional authorities were referred to: *Baker* v. *Story* (1); *In re Dawson* (2); *Earl of Hardwicke* v. *Douglas* (3); *Roper* v. *Radcliffe* (4); *Tupper* v. *Tupper* (5); *Onions* v. *Tyrer* (6); *Ex parte Earl of Ilchester* (7); *Alexander* v. *Kirkpatrick* (8); *In re Bernard's Settlement* (9); *Quinn* v. *Butler* (10); *Duguid* v. *Fraser* (11); *In re Reed* (12);

(1) 23 W. R. 147.
(2) (1888) 39 Ch. D. 155.
(3) (1840) 7 Cl. & F. 795.
(4) (1713) 10 Mod. 230.
(5) (1855) 1 K. & J. 665.
(6) (1716) 1 P. Wms. 342.
(7) (1803) 7 Ves. 348.
(8) (1874) L. R. 2 H. L. Sc. 397.
(9) [1916] 1 Ch. 552.
(10) (1868) L. R. 6 Eq. 225.
(11) (1886) 31 Ch. D. 449.
(12) (1888) 57 L. J. (Ch.) 790.

In re Coppard's Estate (1); *In re Dowson* (2); Theobald on Wills, 6th ed., pp. 559, 715; 7th ed., p. 746; Jarman on Wills, 6th ed., vol. i., p. 139; Halsbury's Laws of England, vol. xxviii., § 1128, pp. 566–7.

The cross-appeal was then argued.

E. W. Lavington for the appellants on cross-appeal. The codicil does not offend against the law as to remoteness. In construing the will it must in the first instance be looked at without regard to the law of remoteness, the intention of the testator ascertained if possible from the words he has used and the ordinary rules of construction applied: *In re Mervin.* (3) The rule of construction applicable to the present case is laid down by Lord Blackburn in *River Wear Commissioners* v. *Adamson.* (4) The testator at the time he made his will had brothers and sisters living, all of whom were over the age of twenty-one years and all of whom had children. These were the only brothers and sisters he knew, and he must have been thinking of these brothers and sisters only; he would not contemplate that he would have further brothers and sisters. His parents were both living, and owing to their age would be unlikely to have further children. When the testator referred to his brothers and sisters he was not referring to them as a class but as personæ designatæ. The will must be read as if he had referred to each of such brothers and sisters by name. The surrounding circumstances must be looked at, and the Court when considering the meaning of the testator's will must put itself into the position of the testator when he made his will and with the testator's knowledge of the facts: see per Lord Davey in *Kingsbury* v. *Walter.* (5)

[He also referred to *In re Cozens.* (6)]

L. F. Potts for the respondents on the cross-appeal. "Brothers" in the codicil is used in a comprehensive sense and includes after-born brothers. *In re Sayer's Trusts* (7), which was followed in *In re Dawson* (8), is conclusive to show

(1) (1887) 35 Ch. D. 350.
(2) (1909) 101 L. T. 671.
(3) [1891] 3 Ch. 197.
(4) (1877) 2 App. Cas. 743, 763, 764.
(5) [1901] A. C. 187, 193.
(6) [1903] 1 Ch. 138.
(7) (1868) L. R. 6 Eq. 319.
(8) 39 Ch. D. 155.

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that evidence that a woman is past child-bearing cannot be admitted in order to show that the testator meant brothers living at his death.

E. W. Lavington in reply.

LORD STERNDALE M.R. I hope I am not wrong in saying that I have done my best to see my way to allow this cross-appeal, because I cannot help feeling that the results of my view now will be to do just what this testator did not wish to do. I do not however feel myself able to do so. The object of his codicil, in my opinion, was to provide that if his wife after his death married a person who was not a natural-born British subject, she should not benefit from, or have any control over, his property, but that the sole objects to be benefited should be the nephews and nieces whom he had mentioned in his will, with an addition of some others to whom I will refer later. The result of the conclusion to which I feel constrained to come is that this lady, instead of being excluded from benefiting under the will, will obtain an absolute interest in a considerable portion of the estate, and that is not what the testator meant.

The first point is that raised by the cross-appeal that the provisions of the codicil do not infringe the rule against perpetuities, and for this reason—that the children of brothers and sisters who are mentioned in the codicil are the children of brothers and sisters who were in existence at the time of the making of the will and codicil and at the time of the testator's death or of such of them as he might reasonably suppose would possibly come into existence before his death. The words of the codicil are these: [His Lordship read the gift in the codicil and continued:] P. O. Lawrence J. has held that that clause infringes the rule against perpetuities, because the father and mother of the testator were living at that time. They were both of them, I think, between sixty and seventy years of age; and as one cannot consider the question of a woman being past the age of child-bearing, but must always assume the possibility of persons having children, there was, therefore, a possibility

that these parents might have had another child. There was another possibility—namely, that one or other of them might have died, and the other might have married again and had a child. That being so, the codicil would give the property to some person who under the rule against perpetuities could not take. I do not repeat what the learned judge said upon this point, because it is unnecessary to do so. I think his decision is right, unless the words "children or child of my brothers and sisters" must be limited to the child or children of brothers and sisters in the way I have mentioned. "Brothers and sisters" is an expression, of course, well known in law. It is an expression which includes after-born brothers and sisters; it includes brothers and sisters of the half-blood as well as the whole-blood; and that is the sense in which the words must be read, unless there is something in the context in which they occur to limit their meaning. I do not think it was seriously argued, although some suggestion was made, that there was any context here which limits the meaning of the words; at any rate, in my opinion, there is none. The only thing that can be said to limit the ordinary meaning of these words is the state of circumstances existing at the time the codicil was made. Those circumstances are that the testator had certain brothers and sisters who were then living, and that he knew the age of his father and mother. The submission therefore is that he contemplated those that were in existence and those only, and that therefore, putting ourselves in his place, we must construe the words as having the meaning he would wish them to bear. Perhaps that is putting it rather too boldly having regard to the argument before us, but it is contended that we must construe them as having that meaning because of the surrounding circumstances when he used them. I have asked if there was any authority to show that words with a well-known meaning could be limited, and had been limited, by circumstances in that way, and I have not had any given to me. I have therefore to consider whether it can be done. In my opinion it cannot, and for this reason. We must, I think, carefully

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guard ourselves against saying that, putting ourselves into the position of the testator and looking at the circumstances that surrounded him when he made his codicil, we are entitled to consider what we think he intended to do by the words he used. To do that leads one into a tremendous expanse of speculation. All you can do is to look and see whether the circumstances limit the words which he has, in fact, used. In this case I do not see that the circumstances do limit the words that he has used. He has used words, as I have already said, with a well-known meaning; perhaps he did not understand their real meaning, but, as I say, if you are to examine into everything which the testator understood, and everything which you may think he meant, there is no end to the speculation into which you may be led. I do not think the circumstances to which I have referred are enough to prevent us from giving, or to allow us not to give, the ordinary and natural meaning to the words the testator has used. Therefore, I think, the learned judge's decision with regard to the question of perpetuities is right.

Then there comes a further point, and it is this. It is said that the gift contained in the codicil having failed by reason of the rule against perpetuities, it has gone altogether, and really you have to look at it as if it had not existed, and then the gift in the will, I will not say revives, but continues to be operative. I do not think that is correct. It may very well be, and some of the earlier cases which have been referred to seem to establish it, that if a gift in a subsequent codicil is of no validity at all that invalidity prevents it having any effect, and the provisions of the will still remain. I should think that would be so. It is also admitted that you may have a gift in a codicil without any express revocation which is so inconsistent with the provisions of the will as to show an intention to revoke them, even although the object of the gift in the codicil cannot be carried out. That being admitted, it becomes at once a question of the construction of the will whether the gift in the will is in fact revoked. I confess I have struggled against the idea of revocation in this case, because the codicil repeats what I have no doubt was the

testator's intention—namely, to benefit his nephews and his nieces, and he accelerates the benefit which he had given them. Speaking generally—I am not speaking of any particular instance—it accelerates the benefits they would have taken under the will. But there is this unfortunate circumstance—that the class which benefits under the codicil is an enlarged and different class from that which benefits under the will. The testator gives the property to his nephews and nieces, and there are some who would not take any benefit under the will, but who would take under the codicil, and he therefore alters the class. He makes a provision as to their attaining twenty-one, which alters not only the class, but also the period of vesting of the benefits to be given to that class; and therefore, in two essential respects the gift contained in the codicil differs from the gift in the will That being so, I cannot see how it can be said that when the gift in the codicil fails there is no revocation of the gift in the will. It is an inconsistent gift, and it is so inconsistent that the two cannot possibly stand together; and therefore it must be that as the objects of the codicil cannot be carried out the revocation of the provisions of the will has taken place. I asked again for a case in which there having been a gift in a codicil inconsistent with that in the will, and that inconsistent gift in the codicil having failed, it had been held that the gift in the will still existed, and no case was given to me.

Two cases were cited to us which at first sight might appear to bear that construction. One of them was *Morley* v. *Rennoldson* (1) and the other *In re Bernard's Settlement.* (2) *Morley* v. *Rennoldson* (1) began with the decision of Wigram V.-C. at the first hearing of the case, that the codicil confirmed the gifts in the will, but only varied the way in which they were to be carried out and dealt with. That being so, of course the codicil did not revoke the gift in the will. The codicil could not be carried out—that is to say, the variations imposed by the codicil in the original gift could not be carried out—and the original gift was never

(1) [1895] 1 Ch. 449. (2) [1916] 1 Ch. 552.

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interfered with by the codicil. The same thing occurred in *In re Bernard's Settlement.* (1) There were no inconsistent gifts to different persons in either of those cases, but it was merely an admitted variation of the method of carrying out the gifts made to the same persons, and those cases do not establish the proposition which the appellants on the cross-appeal have contended for here at all. That being so, it disposes of the case. I think that P. O. Lawrence J.'s decision on this point was wrong. The appeal must be allowed, but the cross-appeal will be dismissed.

WARRINGTON L.J. I should also have been very glad for many reasons if I could have seen my way to dismiss the main appeal and allow the cross-appeal, but I am unable to do so consistently with what appears to be the law on this point. Logically the cross-appeal arises to be dealt with first, for if it succeeds the gift in the testator's codicil would not be void as offending the rule against perpetuities, and in that case the order of the learned judge, which is an order in favour of the nephews and nieces, would stand, with some variation of the class to take, and they would take on a different ground from that on which his decision rests. I therefore deal with the cross-appeal first, although it was argued second.

The testator in this case has used common words of comprehensive meaning, and that meaning is, both popularly and in law, the children of his parents, or one of them—that is to say, it includes brothers and sisters of the half-blood. What is suggested is that, although these words have a common and comprehensive meaning, the testator has here used them in a more limited sense—that is to say, he has confined them to the brothers and sisters who were then living, excluding not only any after-born brothers and sisters of the whole-blood, if it were humanly possible there should be any such, but any brothers and sisters of the half-blood. The argument is founded on the fact that when the testator made his codicil, and when he died, there was no possibility of there being any other child, at all events of the

(1) [1916] 1 Ch. 552.

whole-blood. It was founded in fact on the surrounding circumstances; but it seems to me that there is nothing in those circumstances, although they may show or make one believe that the testator thought he was using words of a limited meaning, which would enable the Court to say that those words found in such a document as this had that meaning. He has used words which I think could only be limited by some context, and certainly there is no context in this will which would indicate an intention to use them in any sense other than the ordinary one. I think the words must be read in their ordinary meaning and accordingly that the gift in the codicil is so wide that it is avoided by the rule against perpetuities.

That brings me to the second question which is raised by the main appeal. What the testator has done is this. He has by his will directed that in the events which have happened his residuary estate should be held in trust for all "the children of my brothers and sisters." By his codicil he altered that by directing that it should be held "in trust for all or any of the children or child of my brothers and sisters who shall be living at the death of my wife or born at any time afterwards before any one of such children for the time being in existence attains a vested interest and who being a son or sons attain the age of 21 years or being a daughter or daughters attain that age or marry if more than one in equal shares." What is contended is that inasmuch as the gift contained in the codicil cannot be carried into effect because it infringes the rule against perpetuities, therefore the gift contained in the will must stand. I am of opinion that is not so. I think it is clear that if you find two gifts, one in the will and one in the codicil, which when properly construed are inconsistent the one with the other, but for some reason the second of the two gifts fails to take effect, then you cannot come to the conclusion that the first of the two gifts is to stand. That that should be the law seems to me to be founded on reason. The testator has by the second of the two gifts ex hypothesi made a fresh disposition. If he had been told that for some reason or another that fresh disposition

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would not take effect, it by no means follows that he would have adhered to his previous intention and have reaffirmed the original one. It is quite possible he would have so modified the second of the two dispositions as to make it capable of taking effect. He could quite well have done that in this case; and, therefore, if you are to say in such a case as that that the first gift is revived you are making a guess at what the testator's intention was and not arriving at the construction of the words he has used in the codicil.

Now I turn to these gifts to see whether they are inconsistent. I think they plainly are. As I have already pointed out, the first gift is to the children of his brothers and sisters without any limitation and without mentioning any period of vesting, so that the interests of the children would vest at birth, and that class to take would be limited to those living at the death of the wife. In the second of the two gifts the interests are changed; they are no longer vested at birth; they are not vested until a child being a son attains twenty-one, or being a daughter marries under that age, which is a very material change indeed. So much with regard to the interests of the children. Then the class is to be altered by being enlarged by bringing in persons who under the original gift would not come in at all. Those two gifts clearly cannot stand together. That being so, it seems to me that the gift in the codicil operated as a revocation of the gift in the will and as a substitution for it; and the gift in the codicil being incapable of having effect given to it, there is no alternative gift to which effect can be given. The result therefore is that there ought to be a declaration that in the events which have happened the testator died intestate as to his residuary personal estate; and, if necessary, I suppose, there will have to be an inquiry who are the next of kin, if any, or rather the persons entitled under the Statute of Distributions unless that has already been proved.

ATKIN L.J. We have to decide in this case a question arising in respect of the rule against perpetuities; and in

order to determine that question we have to construe the will and codicil of the testator, and the rule that should guide us could not, I think, be better stated than by Lord Selborne in *Pearks* v. *Moseley* (1): "The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect." Adopting that rule one seeks to construe the words of this will and codicil, applying the ordinary rules of construction that are applied to documents of this nature. I think those rules of construction cannot be better expressed than in the words of a great lawyer, Lord Blackburn, in *River Wear Commissioners* v. *Adamson* (2), in a case that had to deal with the construction of a statute and not with the construction of a will, but the passage is one which nevertheless has been treated as authoritative in the construction of wills. After stating that it was of great importance that the principles of construction of statutes laid down by the House of Lords in the case before them should be ascertained, the learned Lord proceeds: "I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without enquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used." Then after having dealt with the rules of pleading he continues:

(1) (1880) 5 App. Cas. 714, 719. (2) 2 App. Cas. 743, 763, 764.

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"In construing written instruments I think the same principle applies. In the case of wills the testator is speaking of and concerning all his affairs; and therefore evidence is admissible to show all that he knew, and then the Court has to say what is the intention indicated by the words when used with reference to these extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family." It is to be noticed that in making that statement the learned Lord is not purporting to deal merely with words having a special or technical meaning, but with any words, including, as I understand him, words which may be of a general or comprehensive character.

Now in trying to apply these principles, one has to construe this will. The circumstances that one knows, and knows that the testator knew at the time, are these. He was a man of about forty-six years of age at the time he made his will and the codicil, which was a year or two afterwards. He had a father and mother then living aged about sixty-five or sixty-six years, I think, respectively. His youngest brother or sister was about thirty-two years of age at that time, so that for thirty-two years he had brothers and sisters, who, of course, were well known to him and whom he would have had in his mind. He also must have known that there was no conceivable possibility of his having any more brothers and sisters by his father and his mother—that is to say, his full brothers and sisters. It has been contended before us that you must not be allowed to say that in these Courts, because that would involve the consideration possibly of evidence that would be so indelicate as to offend the judicial mind if it were adduced before it, and in one case would mean the resolving of matters which had better remain in doubt. It is suggested in one of the cases that it might even have involved the inquiry, not merely whether a woman could have a child, but whether a man was past the possibility of having posterity. That that rule has been laid down in reference to the question of perpetuities is an undoubted fact. You must deal with

possible events, and in the eyes of the law, and this is entirely judge-made law, it is always possible that a woman of ninety may have a child, and in the oldest authorities the precedent of Sarah is invoked as being an authority which would support that proposition. Those cases bind us, and I do not seek in any way to dispute that; but the ordinary testator, a man of business, making his will, is not bound by those rules of law, and he may be reasonably assumed to know that his father and his mother when they have reached the age of sixty-five have no possibility of having further children, and that is one of the facts in this case in reference to which this testator must be deemed to have made his codicil and used the words in question relating to his brothers and sisters.

The question is what is meant by the use of those words. [His Lordship read the terms of the gifts in the will and codicil and continued:] Under those circumstances what is the proper construction to be put on the words "my brothers and sisters" in the codicil where he is not leaving property to the class of brothers and sisters, but to a class constituted by "the children of my brothers and sisters"? It seems to me that in a case where a man knew that he could not by any possibility have any other brothers and sisters than those brothers and sisters who had been his brothers and sisters during his life, including, if there were any—I think there were not—a deceased brother or sister, he means those identifiable persons whom he had always known, and who were then in existence as "my brothers and sisters." That is not a case, to my mind, of a man using a comprehensive expression contemplating that that expression would only denote the existing persons, and it appears to me when a man in a will under those circumstances uses the expression "my brothers and sisters," it is precisely as though he wrote out the names of his brothers and the names of his sisters. That is not sufficient for the purpose of this case, or for the purpose of the respondents in this case, because there is the further possibility that the man might have had, or might be referring to half-brothers and sisters, and there is no doubt

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that the words "brothers and sisters" as generally used can denote, and do ordinarily denote, the half-brothers and half-sisters, unless from the circumstances or from the context you may infer that he only intends to denote the brothers and sisters of the whole-blood. I have already stated that, in my opinion, the true inference from the circumstances of this case is that the testator meant his existing brothers and sisters of the whole-blood. But quite apart from that is there anything in the context which would lead one to suppose that he did not intend what there is a presumption would be meant—namely, the brothers and sisters of the half-blood? I think there is, and I think that is found in the further fact which I should now state and in the limitation contained in the codicil. The further fact is that at the date of this codicil there were already in existence some seven or eight children of his existing brothers and sisters of ages ranging up to fourteen years. The eldest of them we were told comes of age some time this year. Then knowing that fact he made a provision "in trust for all or any of the children or child of my brothers and sisters who shall be living at the death of my wife or born at any time afterwards before any one of such children for the time being in existence attains a vested interest," the interest being vested at twenty-one if a son, or if a daughter that age or marriage. Does that help us when we come to consider the question whether he was contemplating the possibility of children of half-brothers or half-sisters taking? I think it clearly does. That limitation would be entirely futile and ineffective in the case of a child of a future half-brother under normal circumstances. His father was sixty-six or sixty-five, and his mother was alive; and in order that there should be any children that could take, the mother must die, the father must marry again, the child must come to an age at which he could marry, and the child of that child must reach the age of twenty-one years, and must do that before any of the existing children reach the age of twenty-one years. That seems to me to be a contingency which no business person could possibly have contemplated in view of those circumstances.

Then it is said by Mr. Owen Thompson that if all these eight children by some catastrophe in their families died before attaining the age of twenty-one, it is probable the testator may have had in mind the fact that he might have a half-brother or half-sister, and that that half-brother or half-sister might have a child who attained the age of twenty-one. I think this is in the last degree unlikely. It appears to me that the circumstances negative any possibility that this testator was contemplating such an event as that: in other words I come to the conclusion in view of the circumstances of the case well known to the testator, and the well-recognized principles of construction that the gift in this case was to the children of the existing brothers and sisters; and on these grounds it appears to me that the cross-appeal should succeed and the declaration as asked should be made.

It follows that having come to that conclusion I think the main appeal should be dismissed, although that does not mean that I think that the declaration appealed against was correct, because in that respect I entirely agree with what has been said by my Lord and Warrington L.J., and I do not desire to add anything. To my mind there was a revocation in this case of the terms of the will, and, therefore, if my view had prevailed, I should have allowed the cross-appeal and dismissed the main appeal.

Appeal allowed and cross-appeal dismissed.

Solicitors: *Beachcroft, Hay & Ledward, for J. N. St. G. Curwen, Workington, and for Brown, Auld & Brown, Whitehaven; Sharpe, Pritchard & Co., for North, Kirk & Co., Liverpool.*

W. I. C.

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[1922. V. 1075.]

Mortgage—Fixtures—Chairs fastened to Floor of Place of Entertainment—Statutory Mortgage of Building and Fixtures—Right of Mortgagee to sell the Chairs under his Power of Sale.

By a deed of mortgage dated December 7, 1920, a limited company carrying on business as cinema theatre proprietors mortgaged freehold land "together with the cinema hall with its fixtures and appurtenances" to mortgagees to secure a loan of 2000*l.* and interest. On June 10, 1922, the company went into liquidation. On September 25, 1922, the mortgagees in purported exercise of their statutory power of sale under the mortgage sold the cinema hall and property together with all chattels and effects therein. The plaintiff company brought this action claiming to recover the value of the chattels and effects. The mortgagees contended that they were all included in the mortgage and, alternatively, counterclaimed for rectification of the mortgage so as to include them. During the hearing the rights with regard to many of the articles, if no rectification was granted, were agreed. There remained four items consisting of (*a*) two oil paintings in the hall of the nature of frescoes; (*b*) a patent frame screen fixed by blocks in the wall; (*c*) four advertising boards fastened outside the hall by screws to the hall posts; and (*d*) 477 plush tip-up seats in blocks of four or eight attached to the floor between the seats by iron standards with iron feet:—

Held, that there was no evidence of common mistake entitling the mortgagees to rectification of the mortgage, but that all the four items specified above passed under the mortgage as fixtures.

Lyon & Co. v. *London City and Midland Bank* [1903] 2 K. B. 135 distinguished.

The principles laid down by Blackburn J. in *Holland* v. *Hodgson* (1872) L. R. 7 C. P. 328, 334, 335 applied.

WITNESS ACTION.

The plaintiffs were incorporated as a limited company on July 16, 1919, and were at all material times seised of certain freehold land situate in Grove Road, Northampton, with the cinema hall erected thereon known as the Vaudeville Electric Cinema, and carried on there the business of cinema theatre proprietors. In connection with and for the purposes of their business the plaintiff company owned and used upon the premises various chattels and effects.

In 1920 the plaintiffs were desirous of raising the sum of

2000*l.*, and by an indenture dated December 7, 1920, and stated to be "made by way of statutory mortgage," the plaintiffs, in consideration of the sum of 2000*l.* paid to them by the defendants O. A. J. Needham Muriset, Peter Weir and W. Yorke Groves, conveyed to the defendants the above-mentioned freehold land "together with the cinema hall with its fixtures and appurtenances and all other buildings and structures erected thereon or affixed thereto or occupied therewith" to secure payment on June 7, 1921, of the sum of 2000*l.* with interest thereon at the rate of 6*l.* 10*s.* per cent. per annum.

On June 10, 1922, the plaintiffs passed a winding-up resolution, and on July 28, 1922, W. H. Fox was appointed the liquidator.

On September 25, 1922, the defendants in purported exercise of the statutory power of sale conferred by the mortgage sold the cinema hall and premises, together with all the chattels and effects therein belonging to the plaintiffs, for 2100*l.*, and the freehold premises were conveyed to the purchaser accordingly.

The plaintiffs brought this action claiming: (1.) a declaration that the defendants were not entitled by virtue of the mortgage or otherwise to sell the chattels and effects on the premises belonging to the plaintiffs; (2.) an order for payment to them by the defendants of the sum of 329*l.* 6*s.*, being the value of the chattels and effects and damages for the wrongful conversion thereof; and (3.) an inquiry as to damages.

By their defence the defendants did not admit that the chattels and effects were moveable but alleged that the mortgage of December 7, 1920, comprised all the chattels and effects, whether moveable or not, in or about the cinema hall or owned or used by the plaintiffs in connection with or for the purpose of the business of cinema theatre proprietors. In the alternative, they contended that, if and so far as the mortgage did not comprise all the chattels and effects, it did not carry out or express the true intention of the parties and ought to be rectified. As a further alternative defence, the defendants, while denying all liability, brought into Court the sum of

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65*l.* 18*s.* 6*d.*, which they said was sufficient to answer the plaintiffs' claim. And they counterclaimed for: (1.) the sum of 47*l.* 2*s.* 5*d.* due in respect of the mortgage debt and interest thereon after giving credit for the purchase price of 2100*l.*; (2.) a declaration that the mortgage ought to be rectified so as to comprise therein all chattels and effects, moveable or immoveable, in or about the cinema hall or owned or used by the plaintiffs in connection with the business; and (3.) rectification of the mortgage accordingly.

The plaintiffs by their defence to the counterclaim joined issue on the claim to rectify, and while not admitting that the sum of 47*l.* 2*s.* 5*d.* remained owing to the defendants, contended that they could only prove in the liquidation for whatever might be due.

The sum of 65*l.* 18*s.* 6*d.* represented the value of the entirely loose chattels, and it was admitted at the hearing that the plaintiffs were entitled to receive this sum, unless the claim to rectify succeeded. It was also admitted that the defendants were entitled to prove for the sum of 47*l.* 2*s.* 5*d.* referred to in the counterclaim.

The remaining fixtures and fittings consisted of:—

(1.) Two oil paintings in the cinema hall of the nature of frescoes.

(2.) A screen in the hall on which the pictures were thrown by the bioscope.

(3.) Electric light fittings throughout the building.

(4.) Seating accommodation for 345 persons in the hall and 132 in the balcony of the hall.

(5.) Two Ruffles Imperial Vulcan Bioscopes and necessary fittings.

(6.) Four advertising boards outside the theatre.

(7.) A flagstaff.

The evidence given at the hearing on the claim for rectification and as to the nature of the attachment of these fixtures sufficiently appears from the judgment. In the course of the hearing it was admitted by the defendants that if the claim for rectification failed the two bioscopes were not included in the mortgage, as they were only attached to the premises

for the purpose of conveying electricity to them from the generating station of the town. As regards the electric light fittings and flagstaff, the plaintiffs admitted that they were fixtures and passed with the mortgage.

Greene K.C. and *H. T. Method* for the plaintiffs. The mortgage did not include chattels so loosely connected with the freehold that they could be readily removed without damage. Chattels such as these are neither "fixtures" nor "appurtenances" within the mortgage. Indeed, as the mortgage was statutory, it could not include these chattels, for under s. 26 of the Conveyancing Act, 1881, a statutory mortgage can relate only to freehold or leasehold land. Further there is no ground for rectification, as there was no common mistake: *Fowler* v. *Fowler*. (1) As to the four items particularly in dispute, the two pictures were in the hall for decoration purposes and did not form part of the building. So also the screen and advertisement boards were not fixtures nor the seating accommodation. No doubt they were all attached to the freehold, but the question whether such articles, when easily detachable, as these were, are fixtures is one of intention to be inferred from the circumstances: *Hobson* v. *Gorringe* (2); *Monti* v. *Barnes*. (3) This case as regards the seats closely resembles *Lyon & Co.* v. *London City and Midland Bank*. (4) It is immaterial that in that case the articles were hired under a hiring agreement with only an option to purchase. This is not a circumstance which could be taken into account: *Reynolds* v. *Ashby & Son*. (5) The intention must be gathered from the degree and object of the annexation to the freehold. When the chattels are fixed for some temporary purpose only, the presumption is that they are not intended to be fixtures: *Holland* v. *Hodgson*. (6) Here the chairs were attached to the cinema hall for the purpose only of the business being carried on there.

(1) (1859) 4 De G. & J. 250, 264.
(2) [1897] 1 Ch. 182, 191.
(3) [1901] 1 K. B. 205.
(4) [1903] 2 K. B. 135, 138.
(5) [1903] 1 K. B. 87, 97; [1904] A. C. 466.
(6) L. R. 7 C. P. 328, 334, 335.

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Galbraith K.C. and *Farwell K.C.* for the defendants. Both sides intended to include the chattels in the mortgage and, if they were not in fact included, the Court ought to grant rectification. The question turns on the evidence. As regards the case apart from rectification, the defendants contend that the mortgage as it stands included all the chattels in question. There is no substance in the distinction sought to be made between an ordinary mortgage and a statutory mortgage. The mortgage included "fixtures" and "appurtenances." Things that are not strictly fixtures will pass as "appurtenances," which were defined by Lord Stowell in reference to a ship as "those accompaniments that are essential to a ship in its present occupation": Abbott's Law of Merchant Ships and Seamen, 14th ed., p. 33. Here the chairs were essential to the cinema hall while it continued to be used as such. Further, this case is stronger than a case where the chattels are the subject of a hire-purchase agreement. Under such an agreement the hirer only becomes the owner of the hired goods at the end of the agreement. It is at its highest a purchase by instalments. Here the chairs belonged to the mortgagors, and they were annexed to the freehold for the more convenient use of them there for the purpose of the business that was being carried on. They are therefore fixtures: *Climie* v. *Wood* (1); *Holland* v. *Hodgson* (2); *Hobson* v. *Gorringe*. (3) The decision in *Lyon & Co.* v. *London City and Midland Bank* (4) turned on the special facts of the case: see per Lord James in *Reynolds* v. *Ashby & Son*. (5) Those facts were that the seats in question had only been hired for a short time, so that the presumption, arising from their attachment to the freehold, that they were fixtures was rebutted. Apart from some special consideration, articles affixed to the soil for use in a building by the owner are fixtures.

Greene K.C. in reply. The word "appurtenances" has a clear and defined meaning in a deed and can have no

(1) (1868) L. R. 3 Ex. 257, 260; (1869) L. R. 4 Ex. 328.
(2) L. R. 7 C. P. 328, 336.
(3) [1897] 1 Ch. 182, 190.
(4) [1903] 2 K. B. 135.
(5) [1904] A. C. 466, 472.

application to these chairs or the other items in dispute. This case as regards the chairs is covered by *Lyon & Co.* v. *London City and Midland Bank* (1), and the Court ought to follow it. There can have been no permanent intention to retain the chairs in the building. They would become useless as soon as the hall ceased to be used as a place of public entertainment.

SARGANT J. In this action the Vaudeville Electric Cinema, Ld., are suing three mortgagees for having wrongfully sold and converted a number of articles either affixed to or in their cinema premises in excess of the powers of sale vested in them as mortgagees. Their statutory power of sale, it being a statutory mortgage, of course only extended to the buildings mortgaged, together with any fixtures that formed part of the property. The defendants set up in their defence that on the true construction of the mortgage they were entitled to sell all the property that they had sold. They brought into Court, as an alternative defence, the sum of 65*l.* 18*s.* 6*d.* in respect of the purchase money of certain articles that were avowedly loose chattels, but they did not give up their defence that those were, on the true construction of the mortgage, comprised in it. They also delivered with their defence a counterclaim by which they claim that if the mortgage on its true construction did not comprise all that they said it did, the mortgage was defective by reason of the common mistake of both parties, and that the mortgage should be rectified in the way mentioned in their counterclaim.

I will deal first with the case of rectification, because it can be dealt with more simply and shortly than the case arising on the claim. The requisites for rectification on the ground of common mistake are pointed out in the judgment of Lord Chelmsford L.C. in *Fowler* v. *Fowler* (2): "The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised.

(1) [1903] 2 K. B. 135. (2) 4 De G. & J. 250, 264, 265.

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But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description." Then he quotes from Lord Thurlow, and continues: "It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."

In my judgment the defendants have failed to satisfy the conditions that were laid down in that judgment; and on this simple ground, that there is nothing to show, or nothing sufficient to show, that there was an intention on the part of the directors of the company to give anything but such a mortgage as they did in fact give. Mr. Harrison, whose evidence I accept, acted as solicitor for the plaintiffs in the negotiation of the mortgage, and he said that Mr. Covington, the managing director of the plaintiff company, had said it was undesirable to give a bill of sale because that might affect the credit of the company, but that a mortgage of the premises could be given. Mr. Covington said he saw the deed of mortgage and that he was under the impression that the company was giving, as he said, a mortgage on the bricks and mortar only, or in other words, that it was an ordinary mortgage, which would of course carry a number of fixtures but nothing more. And he said that he did not intend that there should be a mortgage going beyond that. It is quite clear that the solicitor, Mr. Groves, for the purpose of advising the mortgagees, of whom he formed one, as to the security, did get a valuation, not only of the bricks and mortar, but also of

the fixtures and the loose chattels, but he in no way communicated to Mr. Harrison anything but the fact that the cinema itself had been valued at over 4000*l.* I do not think it is shown that he communicated the result of the valuation of the fixtures and the loose chattels, and in my judgment the persons who were giving the mortgage were not intending at the time they gave the mortgage to do anything more than give the particular mortgage which they in fact gave. I quite see that a mistake was made, but I think it was a mistake by Mr. Groves only. I do not say that it was an altogether unreasonable mistake; still it was a unilateral and not a common mistake, and therefore it is in my judgment impossible for me to rectify the mortgage.

That being so, I have to determine which of the articles made the subject matter of the sale were comprised in the mortgage, and which of them were outside the mortgage and remained the sole property of the company after giving the mortgage. I ought to say that the loose chattels in respect of which the payment into Court was made, undoubtedly did not form a part of that which was mortgaged under the mortgage, and therefore as regards the sum of 65*l.* 18*s.* 6*d.* which was paid into Court, the plaintiffs are entitled to have that sum paid out to them; but of course their claim is not limited to that sum. I have a document showing other property in respect of which conflicting claims arise; and there are seven items or heads there mentioned. As to the first of these, the Ruffles bioscopes, it has been admitted, on behalf of the mortgagees, that as their only attachment to the premises was an attachment for the purpose of conveying the electric current from the generating station of the town to the bioscopes, those did not form part of the property mortgaged. On the other hand Mr. Greene for the plaintiffs admitted with regard to the flagstaff that it was fixed in a way which undoubtedly made it part of the mortgaged property. Then again, in regard to certain electric light fittings it is agreed that they are items which pass under the mortgage.

The only other items I have to consider are four in number.

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The first and most important are the seats in the hall and balcony. Then there was a screen in the hall, a patent frame screen covered with linen cloth, about 8 ft. 6 ins. by 12 ft. 6 ins., fixed by blocks in the wall. That was the screen upon which the images were thrown by the bioscopes. There are also two paintings in the hall, which are in the nature of fresco paintings. Then there are certain advertising boards outside, four in all, fixed to the hall posts by screws. The screen, the two paintings in the hall and the advertising boards outside are all comparatively of small importance. Their total value, even if valued on the footing of the cinema being a going concern, amounts to something under 15*l.* To my mind they are all fixtures; for, although they can be removed, still they are attached to and form part of the building, and are part of the ordinary equipment of the building for the purpose for which it was used and was intended to be used. It is quite clear that the cinema must have a screen on which images are thrown. The paintings or frescoes, in my judgment, form part of the permanent decoration of the hall; and in the same way, the advertising boards outside, fixed as they are, form part of the permanent structure and ordinary adjuncts of the hall as a cinema. With regard to all those items, the position of the mortgagees seems to me not to be open to much question.

Now I come to by far the largest claim, the seats in the hall, which are valued by the company at 178*l.* 17*s.* 6*d.*, and were sold by auction for 98*l.* 8*s.* They are described as plush-covered tip-up seats. I have been given a rather more detailed description of those seats; and they appear to be generally in blocks of four, or perhaps eight. They have iron standards with iron feet, and the standards and feet occur not only at either end of each block of seats, but also between the seats; and those are firmly secured to the floor of the building. The seats are secured in very much the same way in which the seats were secured in *Lyon & Co.* v. *London City and Midland Bank* (1), a case that was decided in the year 1903 by Joyce J. when sitting as an additional judge of

(1) [1903] 2 K. B. 135.

the King's Bench. His decision has been approved of comparatively recently by the House of Lords.

Now what is the position with regard to those seats? That they are in fact affixed somewhat solidly to the floor, there can of course be no question. That being so, it seems to me, on the principles laid down by Lord Blackburn, when he was Blackburn J., in *Holland* v. *Hodgson* (1), that the onus of showing they are not fixtures lies on those who assert the contrary. There is no doubt that for the purpose of determining whether they are fixtures or not, one very material circumstance, perhaps the most material circumstance, to be taken into account, is the purpose for which they were fixed. The classic illustration which was given is in regard to an anchor. What Blackburn J. said was this: "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, than by its own weight it is generally to be considered a mere chattel: see *Wiltshear* v. *Cottrell* (2), and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt* v. *Gregory*. (3) Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become

(1) L. R. 7 C. P. 328, 334. (2) (1853) 1 E. & B. 674.
(3) (1866) L. R. 3 Eq. 382.

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part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." Applying that to the present case here, I find the seats were affixed to the land, and therefore, as I have said, the onus lies on those who say they were not fixtures.

Apart from *Lyon & Co.* v. *London City and Midland Bank* (1), the case decided by Joyce J., I should have thought that the whole trend of the authority in the cases cited to me was in the direction of these seats being fixtures; but *Lyon & Co.* v. *London City and Midland Bank* (1) has been relied on very strongly in support of the opposite contention. That was the case of chairs in a place of entertainment, and the head-note is as follows: "Chairs were hired from the plaintiffs for use in a hippodrome by the owner and occupier of the building under an agreement for hire containing an option of purchase which was never exercised. The chairs were fastened to the floor of the building by means of screws, in accordance with the requirements of the local authority:—*Held*, that the chairs did not cease to be chattels because they were screwed down to the floor, and that the property in them did not pass as against the plaintiffs to the mortgagee

(1) [1903] 2 K. B. 135, 138.

of the freehold under a mortgage of the building and fixtures."

There the manner in which the chairs were fixed seems to me to have been substantially the same as the method by which they were fixed to the floor in the present case; and in that case, as in the present case, there no doubt was a requirement of the local authority which compelled the seats to be so fixed. Nevertheless, in my opinion, the circumstances in that case are such as to distinguish it in a vital particular from the present case. There the parties between whom the question arose were the persons who owned the chairs and the bank, who were the mortgagees of the interest of the hirer, the owner of the Brighton Hippodrome. The argument for the plaintiffs included this argument: "Here the chairs could be easily removed without doing any injury to the freehold"—that would be the case here also—"and the annexation was, as must always of necessity be the case where the chattels are the subject of a mere agreement for hire"—it was an agreement for hire for twelve weeks—"intended to be temporary only and not for the permanent improvement of the building." The argument on the other side was: "It is true that in *Hellawell* v. *Eastwood* (1) it was held that chattels affixed to the freehold for a temporary purpose were distrainable for rent and did not become part of the freehold; but, as was pointed out by Blackburn J. in *Holland* v. *Hodgson* (2), that does not apply to cases where the object of the annexation is to improve the inheritance or to render more effectual the enjoyment of the premises. In the present case the chairs were intended for the better enjoyment of the Hippodrome as a building, and the object and effect of their annexation was the permanent improvement of the building as a place of public entertainment."

I have referred to the arguments on both sides in that case, because I think they explain the judgment of the learned judge. Joyce J., after dealing with some of the cases, said:

(1) (1851) 6 Ex. 295. (2) L. R. 7 C. P. 328.

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" Only a lawyer could suppose that the chairs in this case were the property of the mortgagees of the building, and it is somewhat surprising to find a corporation in the position of the defendants setting up such a claim. But I must decide this case in accordance with the law already laid down, and in my opinion it differs in several respects from the decisions which are relied on by the defendants. In the first place, we are dealing with seats, and not with engines, boilers or trade machinery. Then the seats were complete in themselves and might have been used as seats without any annexation, though no doubt, apart from the requirements of the town council, it was better, considering the place where and the purpose for which they were used, that they should be screwed down to the floor." So far the case is on all fours with the present case. Then he said: " Further the agreement under which these chairs were provided was not an ordinary hire-purchase agreement, and the case of *Hobson* v. *Gorringe* (1) and other decisions have generally been treated as proceeding on the ground that the agreements under which the chattels were supplied were hire-purchase agreements. It is no doubt true that the agreement in the present case, though an agreement for hire only, contained an option of purchase; but that option was never exercised. At the date of the mortgage the property in these chairs was the plaintiffs', and it never passed to Brammall, the mortgagor, who had only that special property in them which every hirer has in hired chattels; it is difficult, therefore, to understand how the legal ownership could have passed to the defendants by virtue of their mortgage. If the chairs had been brought upon the premises by a tenant or occupier after the date of the mortgage, it seems clear that they would not have passed to the defendants as mortgagees, and I see no stronger reason for their so passing in the facts of the present case."—In that case the mortgage had been made after the chairs had been brought on the premises.—" No doubt a chattel on being attached to the soil or to a building prima facie becomes a fixture, but the presumption may be rebutted by showing that the annexation

(1) [1897] 1 Ch. 182.

is incomplete, so that the chattel can be easily removed without injury to itself or to the premises to which it is attached, and that the annexation is merely for a temporary purpose and for the more complete enjoyment and use of the chattel as a chattel. That seems to me to be what has been done in the present case."

There there was a hiring for a short period of twelve weeks only, but that term had been afterwards extended. Working out that agreement would have resulted in this: that at the end of the agreement the hire would have come to an end and the chairs would have been removed; therefore on the terms of that agreement itself there could have been no intention to do anything for the permanent advantage or enjoyment of the property in question. It differed from a hire-purchase agreement in this way: that in the case of a hire-purchase agreement, if the agreement is worked out, the result will be that the goods will become the property of the person who has hired them under the agreement and will become permanently annexed to the place where they are placed by order of the person who has entered into that agreement.

I contrast that case decided by Joyce J. with the facts of the present case. There can be no doubt that in the present case, when the seats were placed in the cinema hall they were placed there for the purposes of the permanent use of the cinema, as a cinema: they were intended to be used as part of the permanent equipment of the building. There was no question of a mere temporary user such as had to be dealt with by Joyce J. in the case I have referred to; and in my judgment no inference could be drawn from anything that was done by the parties that there was an intention to prevent the annexation of the chairs to the flooring and the freehold of the property as a permanent item in the equipment of the property. The fact that here the owner of the property was the owner of the chairs, and that the chairs were being affixed for the permanent benefit and equipment of the property, seems to me to distinguish altogether this case from *Lyon & Co.* v. *London City and*

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Midland Bank (1) where the chairs were the property of the person who let them out for hire, and they were only let out for hire for a comparatively short time. The annexation or affixing of the chairs to the building can never have been intended to have the effect of depriving the person, who let them out, of his property, and make them part of the property of the person who was hiring them.

I think therefore that in this case I must hold that by virtue of the terms of the mortgage the chairs in question passed to the mortgagees. I think that this decision will enable the amount payable to the plaintiffs by the defendants to be easily ascertained. I ought to add that, with regard to the price that has to be paid, it seems to me that, as the mortgagees have sold something to which they were not entitled with the theatre, and so realized a price based on the value of the property as a going concern, they will have to refund the value on that footing of the articles which they wrongly included in the sale.

Solicitors for the plaintiffs: *Sharpe, Pritchard & Co., for William Shoosmith & Sons, Northampton.*

Solicitors for the defendants: *Smith, Fawdon & Low, for W. York Groves, Northampton.*

(1) [1903] 2 K. B. 135.

H. C. G.

In re KAUFMAN SEGAL AND DOMB.

Ex parte THE TRUSTEE.

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Jan. 23.

[1283 of 1922.]

Bankruptcy—Order and Disposition—Reputed Ownership—Consent of true Owner—Hire-purchase Agreement—Hired Chattels—Custom of hiring—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 38 (*c*).

In January, 1922, the respondent purchased from a firm which carried on business in London as clothing manufacturers and merchants, and which afterwards became bankrupt, certain chattels used by the firm in connection with their business. The firm did not part with the possession of the chattels, but the same remained in their possession down to the date of the receiving order. A few days after the purchase a hire-purchase agreement was entered into, whereby the respondent agreed to let on hire to the firm the same chattels at a monthly rent, and whereby it was provided that the hirers should become the purchasers upon the payment by them of all the instalments of rent as therein mentioned, and that while the hiring lasted, the chattels should remain the property of the respondent and the hirers should be bailees thereof. The agreement was also determinable in the event (amongst others) of a receiving order in bankruptcy being made against the hirers, upon which all payments made by them under the agreement were forfeitable and the chattels were to be delivered to the respondent.

On September 6, 1922, a receiving order was made against the hirers, and on September 21 the hirers were adjudicated bankrupt.

On motion by the trustee in bankruptcy for a declaration that the chattels belonged to the bankrupts:—

Held, first, following *Ex parte Brooks* (1883) 23 Ch. D. 261 and *In re Tabor* [1920] 1 K. B. 808, that there existed no general custom of hiring out articles in the nature of the chattels in question, whether strictly described as furniture or not, so as to disentitle any one to assume that they belonged to the bankrupt; and secondly, that, in all the circumstances, the inference was one which, within the statement of the law by Vaughan Williams L.J. in *In re Watson & Co.* [1904] 2 K. B. 753, 757, "must" arise that the chattels belonged to the bankrupts and were in their order and disposition with the consent of the respondent.

MOTION.

Messrs. Kaufman Segal and Domb carried on business as clothing manufacturers and merchants at 3 and 4 Aldgate Chambers in the City of London. On September 6, 1922, a receiving order was made against their estate; on September 21, 1922, they were adjudicated bankrupt, and on September 25 a trustee was appointed.

On January 25, 1922, the respondent purchased from the

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bankrupts for 65*l.*, certain chattels consisting of two cutting tables, fourteen work tables, eleven machines, one button machine, twenty-five stools, one stand, an armchair and one or two other articles, all of which were used by the bankrupts in their trade or business as clothing manufacturers and merchants. The bankrupts did not part with the possession of the goods sold by them to the respondent, and such goods remained in their possession down to the date of the receiving order.

On January 31, 1922, that is to say, about a week after the purchase, the respondent entered into a hire-purchase agreement with the bankrupts, whereby the respondent agreed to let on hire to the bankrupts the before-mentioned chattels, which were scheduled to the agreement, at a monthly rent of 1*l.* 10*s.*; and it was provided that the hirers should become the purchasers of the chattels upon payment of all the instalments of rent amounting to 85*l.* (either in a lump sum or periodically), and that in the meantime, while the agreement lasted, the chattels should remain the property of the respondent and the hirers should be bailees thereof. The agreement was also determinable in the event (amongst others) of a receiving order in bankruptcy being made against the hirers, upon which all payments then made by them were forfeitable and the chattels were to be delivered to the respondent.

The trustee in bankruptcy moved for a declaration that the chattels formed part of the estate of the bankrupts divisible amongst their creditors, as being in the order and disposition of the bankrupts in their trade or business with the consent of the true owner.

Tindale Davis for the trustee. The chattels scheduled to the hire-purchase agreement were in the possession, order and disposition of the bankrupt at the commencement of the bankruptcy within the meaning of s. 38 of the Bankruptcy Act, 1914, and are the property of the trustee. There is no evidence of a general custom of hiring out articles of the nature of those in dispute. The authorities do not establish that any custom to take such articles out of the order and

disposition section of the Act has been recognized by the Courts. In *Ex parte Emerson* (1) Bacon C.J. held that a custom to hire furniture prevailed generally and was not confined to hotel keepers. But that decision is in conflict with the decision of the Court of Appeal in *Ex parte Brooks* (2); and with the recent decision of Horridge J. in *In re Tabor.* (3) The facts in *In re Watson & Co.* (4) are distinguishable from those in the present case. In that case it was clear that the goods were not in the possession of the bankrupts for the purpose of their trade or business, with the consent of the true owners.

Hansell for the respondent. With the exception of the machines, the chattels in question consist of furniture. At the present day the custom of hiring furniture and other things as well is even more prevalent than it was in 1871. The decision in *Ex parte Emerson* (1) ought to be followed in preference to the decisions in *Ex parte Brooks* (2) and *In re Tabor.* (3) It is essential for the trustee to show that the respondent must have known that the effect of leaving the chattels in the possession of the bankrupts would be to lead persons to think that they belonged to the bankrupts—in other words the true owner must have consented to that position of things: *In re Watson & Co.* (4) It does not appear from the circumstances of this case that the respondent consented that the bankrupts should be the reputed owners. In order to bring the goods within the order and disposition section of the Act, it must appear that a reasonable man would be driven to infer that the goods belonged to the bankrupts. The test is whether a reasonable man coming into the bankrupts' shop would come to the inevitable conclusion that the goods belonged to the bankrupts. It is submitted that in the circumstances of this case such an inference was not inevitable.

P. O. LAWRENCE J. In this case the trustee asks the Court to declare that certain chattels described in the schedule to the agreement of January 31, 1922, form part of the property

(1) (1871) 41 L. J. (Bk.) 20.
(2) 23 Ch. D. 261.
(3) [1920] 1 K. B. 808.
(4) [1904] 2 K. B. 753.

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of the bankrupts, divisible amongst their creditors; and the question which I have to determine is, whether those chattels were in the order and disposition of the bankrupts in their trade or business, with the consent of the true owner, in such circumstances that the bankrupts were reputed owners thereof.

[His Lordship then stated the facts above set forth and continued:] The respondent in this case has made two points. The first is that there is a general custom of hiring out articles of this character, whether they are strictly described as furniture or not, so as to prevent the inference by the public that these articles, although in the possession of the bankrupts and used by them in their office or warehouse, were the bankrupts' own property. No evidence has been adduced of the existence of any such custom, but this is not fatal to the contention, because it has been decided that such a custom may be proved by the citation of authorities in which the custom has been judicially recognized.

The respondent in support of his case relies upon the case of *Ex parte Emerson* (1), in which Bacon C.J. held that the Court was bound to take notice of a custom which was then so prevalent as that of hiring furniture. The Court in the present case is asked to follow that decision and to hold that there exists a general custom of hiring out such articles as form the subject matter of this motion. On the other hand, the trustee relies on the recent case of *In re Tabor*. (2) In that case the question of the existence of such a general custom came up directly for decision, and Horridge J. expressed a doubt whether *Ex parte Emerson* (1) was well decided, as it appeared to him to be in direct conflict with *Ex parte Brooks* (3) which he held was binding upon him. In *Ex parte Brooks* (3) Sir George Jessel says that the proposition "that the habits of English society have become so changed by furniture dealers occasionally letting out furniture on a three years' hiring agreement, that the public at large no longer attribute ownership of furniture to the person who is

(1) 41 L. J. (Bk.) 20. (2) [1920] 1 K. B. 808.
(3) 23 Ch. D. 261, 265, 266.

in possession of it," strikes him as extravagant. The learned judge said it was not supported by evidence, it was not in accordance with the old decisions, and it was not in accordance with his view of the law.

Now what is my duty in this state of the authorities? There is, on the one hand, the decision in *In re Emerson* (1); on the other hand, there are the decisions of the Court of Appeal and Horridge J. I think it is my duty to follow—and I do so the more readily, because they accord with my own view of the law—the decisions of *In re Tabor* (2), and *Ex parte Brooks*. (3) *Ex parte Brooks* (3) has also this feature in common with the present case, that the property in question originally belonged to the bankrupts, and, although they parted with the ownership, they never parted with the possession of it. I do not, however, rely on that circumstance, because it seems to me that that fact is really not material for determining the question which I am now deciding. On the question, therefore, of the general custom, I am in favour of the trustee's contention and reject that of the respondent.

The second point taken by the respondent is that, apart from custom, the chattels were in the possession of the bankrupts in circumstances which did not necessarily involve the inference that they were the property of the bankrupts. Mr. Hansell has contended that the trustee in bankruptcy, in order to bring chattels within the order and disposition clause of s. 38 of the Bankruptcy Act, 1914, must prove, not only that the bankrupts are in possession of the goods, but also that they are in possession of the goods under such circumstances that the inference of ownership in the bankrupts "must" arise; and he relies, in support of this proposition, on the judgment of the Court of Appeal delivered by Vaughan Williams L.J. in *In re Watson & Co.* (4) I think that the proposition upon which Mr. Hansell bases his argument on this point is right; that is to say, that the Court is bound to come to the conclusion that the inference of ownership which would be drawn by the public is not

(1) 41 L. J. (Bk.) 20.
(2) [1920] 1 K. B. 808.
(3) 23 Ch. D. 261, 265, 266.
(4) [1904] 2 K. B. 753, 757.

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merely one that "may or may not" arise, but is one that "must" arise.

In the present case I have come to the conclusion that the right view to take is, that, in the absence of any general custom as to hiring, the inference which a reasonable man would necessarily draw from the fact that the articles in question were in the possession of the bankrupts and were being used by them in their trade is that these articles belonged to the bankrupts, and that the inference so drawn is an inference which, within the meaning of Vaughan Williams L.J.'s statement of the law "must" arise. Were it otherwise, then, in order to make s. 38 applicable, it would in every case be necessary to adduce evidence beyond the fact of the possession and apparent complete ownership by the bankrupt of the chattels, and the interpretation placed upon the order and disposition clause by numerous authorities would be very much restricted. It will be observed that neither in *Ex parte Brooks* (1), nor in *In re Tabor* (2), were there any facts proved beyond the fact that the goods were in the possession of and were being used by the bankrupts. The facts in *In re Watson & Co.* (3) were of a special nature, and have no resemblance to the facts of the present case. In that case the goods were being sold on commission by the bankrupts and were in the nature of samples displayed in show cases, and in those circumstances the Court of Appeal held that they were not proved to be in the ownership of the bankrupts, so as to make them reputed owners. In the present case the circumstances are in my judgment such that the inference of ownership must arise, and, consequently, I hold that the respondent's second point also fails.

In the result the trustee succeeds on both points and is entitled to an order in the terms of the notice of motion.

Solicitors: *Hyman Isaacs, Lewis & Mills; Isadore Goldman & Son.*

(1) 23 Ch. D. 261, 265, 266. (2) [1920] 1 K. B. 808.
(3) [1904] 2 K. B. 753.

H. C. H.

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P. O. LAWRENCE J.

[1922. C. 73.]

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Feb. 2, 5, 6, 7; *March* 8.

Easement—Right of Way—Carriage Drive in Front of Terrace—Contemporaneous Leases by common Lessor to different Lessees—Implied Grants and Reservations—Evidence of common Intention—Purchaser for Value without Notice—Statute of Frauds, s. 4—*Part Performance.*

The owner of a piece of land at Cardiff fronting the Newport Road, forming part of a large freehold building estate then in course of development, divided the same into three building plots and leased by separate leases, each dated May 8, 1857, and for 99 years, the plot at the east end to R. C., the plot at the west end to J. C., and the middle plot to J. D. In each case the lessee covenanted to build houses on his plot in accordance with the plan and specification which had been approved of and deposited with the architect of the lessor and signed by him and the lessee. Each lease contained certain express reservations in favour of the lessor, which did not include an easement of way over the drive to be formed between the houses and the boundary wall fronting the road. Two plans, dated respectively July and September, 1856, and a specification were produced from the custody of the successor in business to the lessor's architects; the plans showed the sites, boundary walls and entrance gates at either end of the drive proposed to be erected. The earlier plan was signed by the lessor's architect, who was also acting for the lessees, and by the builders; the later plan was sealed by the Corporation of Cardiff; the specification was signed by R. C. and the builders. Two houses were erected on each of the east and west plots and three on the middle plot, and a boundary wall in front of the houses along the road was built with gates at either end, and a drive of about nine feet in width was made along the front of the houses in the terrace. The occupiers of the houses had, since 1857, uninterruptedly used the drive and the gates at either end, which were their only means of access to the road.

In 1920 the defendant bought the easternmost house and resided there. That house had, in 1878, been assigned by R. C. to P. W. without expressly reserving to R. C. any right to use that part of the drive and the gates opposite the house so assigned. In 1921 the defendant locked the east gates and prevented the occupiers of the other houses from using the part of the drive and the gates opposite his house. Accordingly, an action was brought by the lessees of the other houses in the terrace for a declaration that they were entitled to a right of way along the drive and through the entrance gates to and from the road and for an injunction.

The Court drew the following inferences of fact: (1.) That the lessees early in 1856 agreed (inter se) to lay out their plots as a terrace with the approval of the lessor and to procure building leases from him in accordance with their plans and specifications; (2.) that the erection of the houses, boundary wall and gates according to the plans was commenced

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before the leases were actually granted; and (3.) that the lessees shared the expense:—

Held, (1.) that, as in the circumstances it was shown to be the common intention of the lessees that each of the plots should be so laid out and built upon as to involve a necessary dependency for its means of access to and from the road upon the other plots and, as the lessor by approving the plans and making contemporaneous leases containing covenants to lay out the plots in the form of a terrace according to those plans was himself giving effect to the common intention, the appropriate grants to the lessees and reservations to the lessor would (notwithstanding the existence of some express reservations in the leases) be implied in the lease of each plot, in order to carry that common intention into effect.

(2.) That, even if those grants and reservations could not be implied, yet each lessee acquired the necessary easement over the plots of the others, for the term of his lease, by virtue of a verbal agreement, enforceable in equity, which the Court inferred was entered into between the several lessees before the grants of the leases to them: and that the acceptance of the leases and the erection of the houses and construction of the drive were acts of part-performance unequivocably referable to an agreement between the lessees as to the mutual user of the drive so as to admit evidence of the terms of that agreement.

(3.) That, as the defendant's plot was so situated and laid out, when he purchased it, as to put him upon inquiry which must have revealed the existence of the easements of the other lessees over his part of the drive, the defence of a bona fide purchase for value without notice was not available to the defendant.

(4.) That, the common intention of the parties to the assignment made in 1878, was that they should have reciprocal rights in respect of the user of the drive and gates and that the assignor, after the assignment by him, was to be at liberty to use them in the same manner as he had done before the assignment.

The case fell within the second class of cases—namely, in which easements might be impliedly created—referred to by Lord Parker in his speech in *Pwllbach Colliery Co.* v. *Woodman* [1915] A. C. 634, 646, and the exception to the general rule laid down in *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31.

The declaration sought by the plaintiffs was made accordingly.

WITNESS ACTION.

In and prior to the year 1857, Sir Charles Morgan Robinson Morgan, Bart., was the owner of a large freehold estate at Cardiff called Tredegar-ville, which he was developing as a building estate. Part of the estate consisted of a rectangular piece of vacant land bounded on the south by a public highway called Newport Road, on the east by a street called East Grove, on the west by a street called West Grove, and on the north by an occupation road. In the course of the development of the estate this piece of land was

divided into three rectangular building plots of about equal size, each plot abutting upon and having a frontage to Newport Road and extending backwards to the occupation road.

By three contemporaneous building leases, each bearing date May 8, 1857, these three plots were demised to Richard Cory, John Davies and John Cory respectively. Richard Cory, who was the brother of John Cory, became the lessee of the easternmost plot, John Cory became the lessee of the westernmost plot, and John Davies, who was the brother-in-law of Richard Cory and John Cory, became the lessee of the middle plot. The three leases were in the general form adopted by the lessor for the whole of the estate. They were printed on parchment and, with the exception of the lessees' names, of the parcels, and of the number of houses to be built, were in identical language.

By the lease to Richard Cory—which sufficiently indicates the contents of the other two leases—the lessor demised all that piece or parcel of land situate at Tredegar-ville, Cardiff, in the county of Glamorgan, bounded on the south by the Turnpike Road leading from Cardiff to Newport, on the east by a street called East Grove, on the north by an occupation road, and on the west by other land of the lessor let to John Davies, and being in breadth at the south end 121 feet and at the north end 121 feet, and in depth on the east side 167 feet and on the west side 167 feet, which piece of land was delineated on the plan indorsed on those presents, except and reserved out of that demise unto the person or persons for the time being entitled to the remainder or reversion of the said piece of land immediately expectant on the term of ninety-nine years thereinafter mentioned all mines and minerals, with liberty for such person or persons for the time being to dig, search for and carry away the same; and also the free running of water and soil coming from the other lands or buildings then erected and built or thereafter to be erected and built contiguously or near to the said piece of land and premises thereby demised in and through the drains and watercourses made or to be made

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upon or under the same premises; and also by way of demise and not of exception or reservation all ways, easements and appurtenances whatsoever to the piece of land and premises appertaining or belonging or usually held or enjoyed therewith: to hold the same piece or parcel of land and premises thereby demised to the said Richard Cory, his executors, administrators and assigns, from March 25, 1856, for the term of ninety-nine years thence next ensuing, yielding and paying therefor the yearly rent of 10*l.* by equal half-yearly payments as therein mentioned. Amongst the lessees' covenants contained in this lease were covenants that the lessee would, within one year from September 29, 1856, at his own cost and with the best material and to the satisfaction of the architect or surveyor for the time being of the lessor, erect and build and in a workmanlike manner finish in and upon the premises thereby demised or upon some part thereof two messuages or dwelling houses with appropriate offices in accordance with the plan and specification which had been approved of and were deposited with the architect or surveyor of the lessor and were signed by such architect or surveyor and by the lessee, in token of their mutual approval thereof, and would also within the time aforesaid make and construct upon, under and from the said premises such drains, boundary walls and fences and lay down such pavements as were specified on such plan, and would also lay out and expend in and about such erections and buildings and other works the sum of 1500*l.* at the least, and also would at all times during the said term, at his own cost, well and sufficiently repair, maintain, and keep the said messuages and other buildings and the said drains and watercourses, pavements, boundary walls, fences and other erections which at any time or times during the said term should be built, erected or made in, upon, through or under the said premises with all manner of needful reparations and amendments whatsoever.

The plan indorsed on the lease consisted of a ground plan showing, in bare outline, the boundaries of the demised plot, and giving the measurements of those boundaries, but

containing no indication of the buildings or other works covenanted to be constructed thereon.

At the trial two plans and a specification were produced. One of the plans was dated July, 1856, and the other September 26, 1856. The specification was undated. Both the plans showed how the three plots were intended to be laid out; they consisted of ground plans delineating in outline the site of the buildings, boundary walls and entrances proposed to be erected. These plans came from the custody of the successors in business to the lessor's architects and surveyors. The earlier plan was signed by the lessor's architects, who were also acting as architects for the three lessees, and by the builders who were employed to erect the houses and boundary walls; and the later plan was sealed by the Corporation of Cardiff and signed by the then Mayor of Cardiff. The specification, which also came from the custody of the successors in business to the lessor's architects, was signed by Richard Cory and by the builders, and obviously related to the two dwelling houses and other buildings to be erected on Richard Cory's plot. The three plots were laid out and the dwelling houses and boundary walls were erected in accordance with the above-mentioned plans and specification. The scheme of laying out was as follows: Two dwelling houses were erected on Richard Cory's plot, three on John Davies' plot, and two on John Cory's plot. These seven houses fronted towards, but were set back about forty feet from, Newport Road, and formed a terrace subsequently called Halswell Terrace. In front of these houses along the Newport Road a continuous wall was constructed with a set of gates at either end. Each set of gates consisted of four wrought-iron gates hanging on four ornamental stone piers. The two centre gates were wider than the side gates and closed on one another, forming an entrance for vehicles; the two narrower side gates closed on the piers of the centre gates and formed entrances for foot passengers. A carriage drive of about nine feet in width was constructed close alongside the front of the houses in the terrace, which drive at its two ends led out into Newport Road through the centre opening of each set of gates. The

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strip of land between the drive and the wall along Newport Road was laid out as a garden and planted with ornamental trees and shrubs.

The drive constituted the only mode of access to the front of the houses, none of which had a separate tradesmen's entrance. The set of gates at the east end of the wall was situate on the plot demised to Richard Cory, and the set of gates at the west end of the wall was situate on the plot demised to John Cory. The drive in front of the houses was not of sufficient width to enable a carriage to turn, and only the front door of the end house on the east side of the terrace was placed in such a position that a carriage could turn in front of it. Accordingly, for the purpose of gaining access to and from the front door of each of the seven houses in the terrace from and to Newport Road, the occupant had to make use of one or other of the entrance gates and of the drive; whilst whenever the driver of a vehicle wanted to deposit passengers or goods at the front door of any of the houses, except the easternmost, and then regain the Newport Road he had to make use of both gates and the entire length of the drive. Shortly after the year 1869 the owner and occupier of the middle house of the terrace constructed a narrow gate suitable for foot passengers in the wall immediately opposite to his house and made a footpath across the strip of garden ground between the drive and the gate.

The carriage gates had never been kept locked since they were erected, and the owners and occupiers of the houses in the terrace enjoyed free and uninterrupted use of both sets of gates and of the drive as means of access between their houses and the road ever since the terrace was built in 1857, down to the interruption complained of, with the exceptions that between 1896 and 1900 the gates at the east end of the drive were locked by the owner of the house situate at that end of the terrace and again that in 1919 the gates at the west end were locked by the owner of the house situate at that end, but on both occasions, as the Court found, the gates were locked only for the purpose of insuring greater privacy and for the mutual convenience of the owners and occupiers of

all the houses in the terrace, for whom the keys were at all times available.

In October, 1920, the defendant bought the easternmost house in the terrace and came to reside there. This house was one of the two houses built on Richard Cory's plot and had been assigned by Richard Cory to Mr. Philip Williams for the residue of the term by an indenture of assignment dated June 26, 1878, subject to the payment of a moiety of the rent of 10*l.* reserved by the lease to Richard Cory of May 8, 1857. That assignment did not contain any reservation in favour of Richard Cory of the right to use that part of the drive which was in front of the house assigned, or of the right to use the eastern entrance gates.

On January 18, 1922, the first four plaintiffs, who were the owners of the house next door to the defendant's house, and the plaintiff Brierley, who was the owner of the middle house in the terrace, commenced this action, claiming a declaration that they were entitled to a right of way for themselves and their servants to pass along and over the drive and through the entrance gates to Newport Road, and back again from Newport Road, and through those gates and over and along the drive to the houses in the terrace, on foot and with horses, carriages and other vehicles at all times. And an injunction restraining the defendant, his agents or servants from locking or keeping locked the entrance gates at the eastern end of the terrace, and from otherwise obstructing or interfering with the exercise of their right of way. Subsequently the owners of all the other houses in the terrace were added as plaintiffs.

Owen Thompson K.C. and *F. Renfield* for the plaintiffs. The drive, as the only means of access between the houses in the terrace and the road, has been used uninterruptedly by the several lessees for more than sixty years and has been so used "Nec vi, nec clam nec precario." In such circumstances, the Court will impute a legal origin to the user.

Owing to the existence of a common landlord, it is not contended that the plaintiffs have acquired an easement by

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prescription either at common law or under the statute or under the presumption of lost grant: *Wheaton* v. *Maple & Co.* (1); *Kilgour* v. *Gaddes.* (2)

The leases were granted contemporaneously, and the true inference to be drawn from all the facts is that the several lessees at or before the grants of the leases came to a mutual arrangement to lay out their plots as a terrace with a common drive, and to obtain building leases from the lessor in accordance with the plans and specifications, and that the lessor by approving the plans and taking covenants from the respective lessees to erect and maintain the houses, boundary walls, and entrance gates made himself a party to the arrangement. Therefore there must be implied in the lease of each plot a grant by the lessor of the right to use the drive and the gates and a corresponding reservation in favour of the lessor and his lessees as owners and occupiers of the houses on the other plots of the right to use the same so far as they were constructed on the plot demised. In the case of a grant there may be implied such continuous and apparent easements or quasi-easements as are necessary for the reasonable enjoyment of the property conveyed and have in fact been enjoyed during the unity of possession. As a general rule, similar reservations are not to be implied in favour of the grantor. Such reservations to be effectual must be express. But to that rule there is an exception in a case where, in order to give effect to what appears from the circumstances attending the grant to have been the common intention of the parties, it is only reasonable to imply a reservation in favour of the grantor. This case comes within that exception, as the construction of the houses and drive according to the plans and specifications involve the mutual dependency, for the purpose of access, of each plot upon the others. In such cases it is only reasonable to imply a reservation in favour of the grantor for the purpose of giving effect to the common intention of the parties. The case falls within the exceptions mentioned in *Wheeldon* v. *Burrows* (3) from the

(1) [1893] 3 Ch. 48. (2) [1904] 1 K. B. 457.
(3) 12 Ch. D. 31.

general rule there laid down that the reservation of an easement must be express, and within the second class of cases mentioned by Lord Parker in *Pwllbach Colliery Co.* v. *Woodman* (1), and within the principle of *Hansford* v. *Jago* (2): see also *Pyer* v. *Carter* (3); *Swansborough* v. *Coventry* (4); *Allen* v. *Taylor* (5); and *Brown* v. *Alabaster*. (6) It is not necessary to show that the drive was actually formed at the time of the grant of the lease. The circumstances at the time of the leases being granted were sufficient to establish the apparency of the quasi-easement: *Rudd* v. *Bowles*. (7)

In the assignment to P. Williams in 1878, it was not necessary for R. Cory expressly to reserve an easement over the land assigned. It is reasonable to infer an intention that the assignee and assignor were to enjoy reciprocal easements in respect of the drive and gates, especially when regard is had to the uninterrupted user of the drive for over sixty years by both. Those reciprocal rights were always part of an overriding scheme and the easements were of quasi-necessity.

Jenkins K.C. and *Gavin Simonds* for the defendant. The facts do not justify the inference that the lessor was a party to such an arrangement as that which it is suggested the lessees came to between themselves. Whatever scheme or arrangement there was relating to the terrace and means of access was one which was made between the lessees only and to which the freeholder was not a party. As the leases contained express reservations in favour of the lessor which did not comprise a right of way over the drive, as a question of construction, a reservation of the necessary easement in favour of the lessor cannot be implied; and it is improbable that so important a matter as means of access should have been left to depend on inference. The case is not taken out of the general rule of *Wheeldon* v. *Burrows* (8), that for a reservation of an easement to be effectual it must be expressly reserved. *Brown* v. *Alabaster* (6) and *Rudd* v. *Bowles* (7)

(1) [1915] A. C. 634, 646.
(2) [1921] 1 Ch. 322.
(3) (1857) 1 H. & N. 916.
(4) (1832) 9 Bing. 305.
(5) (1880) 16 Ch. D. 355.
(6) (1887) 37 Ch. D. 490.
(7) [1912] 2 Ch. 60.
(8) 12 Ch. D. 31.

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related to implied grants, not to implied reservations. In *Hansford* v. *Jago* (1), although there was no made up road, the strip of land was at the date of the conveyance defined and enclosed, having been set apart to provide means of access to the rear of the houses: but, here, the drive had not been formed at the time the leases were granted. It is in fact sought to put something into the leases which is not in them. Surrounding circumstances at the date of the leases may be regarded, but not those which existed afterwards.

The alleged agreement does not comply with the Statute of Frauds, and there has been no part-performance. The agreement set up is founded on inference from the facts: it is a matter of pure speculation whether the lessees would have refused to accept the leases, unless they were granted the easement in question. The only acts of part-performance consisted in taking the leases in the form in which they were and the expenditure of money on the drive, which was a necessary consequence of the covenants; those are acts not unequivocably referable to the agreement set up: *Maddison* v. *Alderson*. (2) The plaintiffs were only revocable licensees of the right to use the drive.

Further, the defendant was a purchaser for value without notice of the easement claimed over the part of the drive and gates on his plot. From a mere inspection of the property he is not affected by notice of the existence of an easement in the plaintiffs, nor was there sufficient to put him on inquiry: *Hervey* v. *Smith* (3); *Prinsep* v. *Belgravian Estate*. (4)

As on the assignment in 1878 by R. Cory to P. Williams (the defendant's predecessor in title) there was no reservation by the vendor of an easement over the drive in front of the defendant's house, the claim of the plaintiffs, the executors of R. Cory deceased, to an easement of which the defendant had no notice is in derogation of the assignment made by R. Cory and must fail on that account.

(1) [1921] 1 Ch. 322.
(2) (1883) 8 App. Cas. 467.
(3) (1855) 1 K. & J. 389.
(4) [1896] W. N. 39.

Owen Thompson K.C. in reply. On the assignment in 1878 the assignee was clearly intended to have an easement over that part of the drive which was on the assignor's land, and it is reasonable to infer a reciprocal easement in the assignor's favour on that occasion, especially having regard to the actual user of the drive by the assignor and those deriving title under him since 1878, without objection by his assignee and his successors: the case falls within the exception to the general rule in *Wheeldon* v. *Burrows*. (1)

The acceptance of the leases referring to the plans, the construction of the boundary walls and drive and entrance gates, and the user of the drive as the only reasonable means of access to the houses are acts of part-performance and referable to an agreement, and take the case out of the Statute of Frauds. The true inference from the facts is not a revocable licence: permanent works have been executed by the plaintiffs, and even if there were a revocable licence (ab initio) it became irrevocable after money was expended on the terrace: *Winter* v. *Brockwell* (2); *Bankart* v. *Tennant* (3); *Plimmer* v. *Mayor of Wellington* (4); Goddard on Easements, 8th ed., p. 529.

It is not open to the defendant to plead that he is a purchaser for value without notice: the position of the terrace and the drive were such as to put the defendant on inquiry (if indeed inquiry were necessary) which would have given him notice that the drive was subject to a right of way in favour of the plaintiffs: *Davies* v. *Sear*. (5)

As to the implied reservation: it is not contained in the leases themselves, but is derived from the surrounding circumstances. Such a reservation is not inconsistent with the leases. True, the right of way was not amongst the reservations expressed in the leases, but those reservations are only such as are commonly mentioned in leases of that kind. The implication need not be a necessary one, but will be readily drawn in order to carry out the common intention of the

(1) 12 Ch. D. 31.
(2) (1807) 8 East, 308.
(3) (1870) L. R. 10 Eq. 141.
(4) (1884) 9 App. Cas. 699.
(5) (1869) L. R. 7 Eq. 427.

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parties shown from a reasonable consideration of the surrounding circumstances at the time the leases were granted.

Cur. adv. vult.

March 8. P. O. LAWRENCE J. This case, which presents certain novel features, has given rise to an interesting discussion on a familiar branch of our law. The principles involved are well established, but their proper application to the special facts of this case is by no means free from difficulty. [His Lordship then stated the facts as above set out and continued:] If the defendant is right in his contention, it seems to me to follow that the owner of the easternmost house would have the right to prevent the user of the western carriage gates and of that portion of the drive which lies in front of his house. Consequently, if both these owners determined to exercise their alleged right at the same time, all the other occupiers in the terrace would be cut off from vehicular access to and from their dwelling houses from and to Newport Road. Further, it appears to me that the owners cannot pull down the wall in front of their houses and thus gain an entrance for vehicles from Newport Road without committing a breach of the covenants contained in the leases of May 8, 1857, to maintain and repair all boundary walls and fences. Moreover, an entrance afforded by such pulling down would be useless, as, owing to the short length of frontage possessed by each owner, it would not be practicable for him to approach his front door with vehicles. In these circumstances common sense seems to me to demand that the Court should, if possible, find some legal origin for the right hitherto openly enjoyed by the plaintiffs for so long a period.

Before dealing with the legal points which arise, I will state what inferences ought, in my opinion, to be drawn from the facts proved at the trial. In the first place, I think it is to be inferred that at some time in the early part of the year 1856, the three lessees, having ascertained that the lessor was willing to let them have building leases of the

three plots, verbally agreed between themselves that they would lay out the plots as a terrace in the manner described and that, after having obtained the lessor's approval to such laying out, they would procure the lessor to grant to them building leases, in accordance with their plans and specifications. In my opinion, these inferences are legitimately drawn from the dates and contents of the plans, from the date of the commencement of the terms created by the leases, and from the fact that in the leases the plans and specifications of the houses are referred to as having been approved by and deposited with the architect of the lessor. Although the plaintiffs have been unable to produce the actual plans and specifications referred to in the leases, I think that the presumption is that those plans and specifications were in all respects similar to the plans and specification which have been produced, because such last-mentioned plans and specification came from the custody of the successors to the lessor's architect, and the buildings were actually carried out in accordance therewith. In the next place I think it is to be inferred that the houses, boundary wall and gates were commenced to be built, according to the approved plans and specifications, before the leases were actually granted. This inference is, I think, legitimately drawn from the date when the plans were approved by the local authority and from the covenant in the leases that the buildings and erections were to be completely finished within a year from September 29, 1856—that is, from a date over seven months before the date of the leases—leaving only about five months from the date of the leases for the erection and completion of the whole terrace. Lastly, I think it is to be inferred that the three lessees shared the expense of erecting the front wall and the two entrance gates. Mr. Jenkins on behalf of the defendant did not seriously dispute that this last-mentioned inference is the natural one under the circumstances.

I now turn to the consideration of the legal points which arise. It is well settled that a lessee cannot acquire a right of way over the land of another lessee under the same lessor,

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either by prescription at common law or under the doctrine of a lost grant or by prescription under the Prescription Act, 1832: see *Wheaton* v. *Maple & Co.* (1) and *Kilgour* v. *Gaddes.* (2) Consequently the plaintiffs, although they have enjoyed the right which they now claim for over sixty years, cannot base their claim to such right upon prescription, either at common law or under the statute, or upon the doctrine of a lost grant.

In my judgment, however, the circumstances in the present case are such that, in order to give effect to the common intention of the parties, the law will imply the appropriate grants and reservations in the three contemporaneous leases of May 8, 1857. This common intention would be given complete effect to, if there were implied in the lease of each plot a grant to the lessee of the right, during the term, to use the drive and entrance gates and a reservation to the lessor and to his lessees, as owner and occupiers of the houses erected on the other two plots, of the right to use the drive and entrance gates, so far as such drive and gates were constructed on the demised plot. The present case, in my opinion, falls within the second of the two classes of cases in which, according to Lord Parker's speech in *Pwllbach Colliery Co.* v. *Woodman* (3) easements may impliedly be created. Lord Parker there states that this class of cases does not depend upon the terms of the grant itself, but upon the circumstances under which the grant was made, and that the Court will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to the grant with reference to the manner or purpose in and for which the land granted or some land retained by the grantor is to be used, pointing out, however, that it is an essential condition of the implied creation of such easements that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner and that it is not enough that the user intended by the parties

(1) [1893] 3 Ch. 48. (2) [1904] 1 K. B. 457.
(3) [1915] A. C. 634, 646.

might or might not involve that definite and particular use. The defendants, however, contend that the Court ought not to act on this principle, because in the circumstances of this case its application would involve the implication of a reservation in favour of the lessor, and that such an implication is contrary to the principle laid down in *Wheeldon* v. *Burrows*. (1) That case, no doubt, lays down the general rule that, if a grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant, and I think that there is great force in the argument that this general rule applies a fortiori where the grant, as in the present case, contains certain express reservations in favour of the grantor. It is evident, however, from the judgment in *Wheeldon* v. *Burrows* (1), that there are exceptions to this general rule, and I am of opinion that the present case forms one of these exceptions. The three leases of May 8, 1857, were really parts of one transaction, by which the lessor was at the same moment disposing of the sites of all the three plots, that is to say, of the whole of the land over which the easements were to extend, and the easements were only required for the beneficial enjoyment by the lessees of the three plots. In fact the lessor in granting the three leases containing covenants to lay out the three plots in the form of a terrace was only giving effect to the arrangement made between the three lessees, and, therefore, this is not a case where the lessor or anybody deriving title under him by virtue of a subsequent grant is claiming the benefit of an implied reservation in favour of the lessor for his own benefit. In these circumstances the Court ought not, in my opinion, to let the general rule stand in the way of holding that the appropriate grants and reservations, in order to carry out the common intention of the parties, ought to be implied, in spite of the fact that particular reservations in favour of the lessor are to be found in the leases. The argument based on the express reservations, in my opinion, loses much of its force owing to the fact that the leases, including of course the express reservations, are all in the common form adopted for

(1) 12 Ch. D. 31.

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the whole of the lessor's estate. It is perhaps not to be wondered at that the lessor did not sufficiently appreciate the advisability of adding to the common form of leases express provisions as to the drive and entrance gates, as his interest in those provisions was exceedingly remote and would only arise in the unlikely event of one or two of the leases terminating before the others or other of the leases. Nor perhaps is it to be wondered at that the lessees did not stipulate for the insertion of express grants and reservations, as it would hardly occur to them that, after the three plots had been laid out in the manner described, any one or two of them could have successfully contended that the drive and entrance gates were not constructed for the joint benefit of all three. For these reasons I am of opinion that neither the rule laid down by *Wheeldon* v. *Burrows* (1) nor the fact that the leases contain express reservations in favour of the lessor prevents the Court from implying the appropriate grants and reservations in order to give effect to the common intention of the parties to the leases.

It was further argued on behalf of the defendant that the lessor was no party to the arrangement made between the three lessees and consequently no grant by him or reservation in his favour ought to be implied. I cannot accede to this argument. In my opinion, the lessor by approving of the plans and specifications showing that the three plots were to be laid out in the form of a terrace with a wall and entrance gates, and by making the lessees covenant to erect the dwelling houses, wall and entrance gates according to such plans and specifications, and obliging them to maintain such erections intact during the term, made himself a party to the arrangement, notwithstanding that such arrangement originated with the lessees.

The view which I have taken is, I think, supported by the decision of Russell J. in the recent case of *Hansford* v. *Jago* (2), which in some respects resembles the present case. There the learned judge, after an exhaustive review of the authorities, came to the conclusion that the Court ought

(1) 12 Ch. D. 31. (2) [1921] 1 Ch. 322.

to imply the appropriate grants and reservations to secure to each of four purchasers under contemporaneous conveyances a right of way over the adjoining plots of the other purchasers for the purpose of access to the back of each of the four tenements conveyed. This decision was based mainly on the cases of *Pwllbach Colliery Co.* v. *Woodman* (1); *Swansborough* v. *Coventry* (2); *Allen* v. *Taylor* (3); *Brown* v. *Alabaster* (4); and *Rudd* v. *Bowles.* (5) Although the facts of the present case are not on all fours with the facts in *Hansford* v. *Jago* (6), yet I think that the principle which the learned judge deduced from the authorities and applied to the facts of the case before him is the principle which ought to be applied to the facts of the present case. I can come to no other conclusion than that, in the circumstances of this case, each of the three plots was intended to be and was in fact so laid out and built upon as to involve a necessary dependency for its enjoyment upon the other plots.

On the whole, therefore, for the reasons stated, I am of opinion that the plaintiffs are entitled to the relief claimed by them on the ground that the necessary easements were impliedly created on the grant of the three leases of May 8, 1857.

Assuming, however, that the Court is not at liberty to hold that the appropriate grants and reservations ought to be implied in the leases, there is another way in which, in my judgment, substantially the same result may be reached.

It cannot, I think, be doubted that several lessees under the same lessor may by express grant as between themselves create such easements as are claimed by the plaintiffs in this action, limited, of course, to the duration of the term vested in each lessee. Further it cannot, I think, be doubted that the right to an easement (including such a limited easement as I have just mentioned) might, in 1857, have been created

(1) [1915] A. C. 634, 646.
(2) 9 Bing. 305.
(3) 16 Ch. D. 355.
(4) 37 Ch. D. 490.
(5) [1912] 2 Ch. 60.
(6) [1921] 1 Ch. 322.

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by an agreement enforceable in equity, although not under seal, and that such an agreement would be as good as a deed for the purpose of creating a lawful user of the right: see statements by Lindley J. in *Dalton* v. *Angus* (1) and in *Wheaton* v. *Maple & Co.* (2)

In the present case the facts proved at the trial, in my opinion warrant the conclusion that the three lessees, before accepting their leases, entered into a verbal agreement between themselves that they would lay out the three plots in the manner described, and that they would apply to the lessor for building leases of their plots containing provisions for the erection of buildings in accordance with their joint plan and that, when the terrace was completed, each of them should have the necessary easements over the plots of the others in order to carry out their common intention. Such an agreement, if made, would undoubtedly be an agreement enforceable in equity, and would, therefore, be as efficacious as a deed.

It is true that the Statute of Frauds would afford a defence to an action brought on such an agreement, unless it had been part performed. In the present case, however, there can, in my opinion, be no doubt that part-performance has taken place, and that such part-performance affords a complete answer to the defence founded on the statute. The fact that each of the three lessees accepted a lease of his plot compelling him to erect his houses in the position in which they were placed, and subsequently erected the houses and the wall with the gates and constructed the drive, are all unequivocal acts having reference to some agreement between the three lessees as to the user of the drive and gates and are, therefore, acts of part-performance, letting in oral evidence as to the terms of the agreement.

On this additional ground, therefore, I am of opinion that the right claimed by the plaintiffs can be supported.

There are however two further points taken by the defendant with which I must deal. The first is that the

(1) (1881) 6 App. Cas. 740, 765. (2) 1893] 3 Ch. 48, 65.

defendant purchased his house without notice of the existence of the easement alleged to have been granted over his land and that, therefore, he is not bound either by any implied reservation in the lease of his plot or by any verbal agreement which may have been come to between the original lessees of the three plots.

In my judgment, the answer to this point is that the property purchased by him was so situated and laid out that even the most cursory inspection of it would have put him upon inquiry as to the existence of any easements over the drive and through the gates in favour of the owners and occupiers of the other houses in the terrace. Moreover, the name of the next door house was carved upon the left-hand pier of the gates in front of his house, and this fact alone ought, in my opinion, to have put the defendant on inquiry as to the right of the owners of that house to use the gates, which inquiry would have led to his finding out the rights of all the other residents in the terrace. In these circumstances, my conclusion is that the defendant was affected by all the equities which affected his vendor, and that the plea of bona fide purchaser for value without notice fails: see *Hervey* v. *Smith*. (1)

The remaining point made by the defendant is that as against the four first plaintiffs, who are the executors of Richard Cory, he is entitled to succeed by reason of the assignment made to his predecessor in title in 1878, his contention being that, as Richard Cory, the assignor, made no reservation of any right to use the drive and the gates, any claim by his executors to such right would be in derogation of the assignment.

In my judgment, this contention also fails. Mr. Philip Williams was the assignee under the assignment of 1878, and he no doubt was to take an easement over so much of the drive as was situate on his assignor's land. In these circumstances, it does not seem to me to be unreasonable to infer that he took such easement subject to the reciprocal easement in favour of his assignor over so much of the drive

(1) 1 K. & J. 389.

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as was situate on the land assigned. Such reciprocal and mutual easements, in my opinion, form another exception to the general rule laid down by *Wheeldon* v. *Burrows* (1): see remarks of Thesiger L.J. In the present case the Court would, I think, the more readily imply the necessary reservation, because ever since the assignment (i.e., for a period of over forty years) the assignor and those deriving title under him have exercised the right now claimed without let or hindrance from the assignee and those deriving title under him. Moreover the assignee himself, on the occasion I have mentioned, asked the permission of his assignor to lock the gates, thus clearly showing that he, the assignee, acknowledged the right of his assignor to use them, and the drive. In these circumstances it is, I think, obvious that the common intention of the parties to the assignment of 1878, was that they should have reciprocal rights in respect of user of the drive and of the entrance gates, and consequently that the assignor should, after the assignment, be at liberty to use the drive and gates in the same manner as he had done before the assignment.

Should, however, the Court in these circumstances not be at liberty to imply such a reservation in favour of the assignor, I think the facts warrant the finding that a verbal agreement had been come to between Richard Cory and Mr. Williams, that in consideration of the former assigning to the latter the end house together with the right to use the whole of the drive and the western entrance gates, the latter should grant to the former the right to use the drive and the eastern entrance gates, which agreement had been part-performed by the execution of the assignment and by the fact that the former had executed certain decorative work on the stone piers of the eastern entrance gates and also certain repairs upon that part of the drive which was situate on the defendant's property.

On both these grounds, therefore, I hold that the first four plaintiffs as well as the other plaintiffs are entitled to the relief claimed against the defendant in this action.

(1) 12 Ch. D. 31, 59.

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1923

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There will be a declaration and an injunction in the terms of the prayer in the statement of claim and the defendant must pay the costs of the action.

Solicitors: *Kinch & Richardson, for Allen Pratt & Geldard, Cardiff; Pritchard, Englefield & Co., for W. B. Francis & Son, Cardiff.*

H. C. H.

ROMER J.

1922

Dec. 1, 4.

CARDIFF CORPORATION *v.* COOK.

[1922. C. 728.]

Lands Clauses Acts—Compulsory Acquisition—Compensation—Assignment after Claim under Notice to treat before Acceptance of Claim—Withdrawal of Offer—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18).

A landowner has a right to deal with his property after a notice to treat, although the right must be exercised subject to the rights acquired by the undertakers by virtue of the notice and so as not to increase their obligations, and he is also entitled before acceptance to withdraw and amend his claim.

But where a landowner (possessed of a leasehold interest) who has claimed 550*l.* for compensation for disturbance and valued his leasehold interest at nil, subsequently, but before his claim is accepted, assigns his leasehold interest, his assignee stands in the same position as the landowner and can withdraw or amend the claim, either expressly or by sending in a claim in respect of the leasehold interest wholly inconsistent with the original claim, and the undertakers are not then at liberty to disregard the assignee and continue to treat and contract with the original landowner.

Mercer v. *Liverpool, St. Helens and South Lancashire Ry. Co.* [1903] 1 K. B. 652; [1904] A. C. 461 applied.

IN 1915 the Cardiff Corporation, under a provisional order duly confirmed, obtained for the purposes of street widening compulsory powers in regard to certain premises at Cardiff, including No. 2 Duke Street, the premises in question in this action, comprising a shop, offices and workrooms, of which the lessees or reputed lessees and occupiers were the defendants Frank Henry Cook, Ernest Edward Cook and Robert Lane.

The defendants F. H. Cook and E. E. Cook (who traded in partnership as Thomas Cook & Son) held the premises in question on a lease for five years ending at Christmas, 1922,

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with an option to renew for another five years. The defendant Robert Lane, at the time of the order and the confirming Act, was an under-tenant of part of the premises demised to him by his co-defendants for a term of ten years commencing in 1907.

On August 2, 1919, the Corporation served upon F. H. Cook and E. E. Cook separate notices to treat in the usual form in respect of the premises in question and also on Robert Lane, who had held on after the determination of his lease at the old rent and whose position at that time was that of a yearly tenant. On August 22, 1919, the defendants Cook sent in to the Corporation particulars of their claim, each partner sending in a separate claim, but substantially in the same form. Under the heading of "particulars of claim specifying separately the amount claimed for value of property and for compensation for loss or injury," E. E. Cook claimed as follows: "Compensation for disturbance 550*l*. In connection with the renewal of our business activity after the war and the fact that it would be utterly impossible for us to carry on in existing premises after a portion had been taken away, we have considered it urgently necessary to make arrangements at once for a removal securing other premises at a heavy premium and removing thereto as soon as possible. Claim for disturbance, 550*l*." F. H. Cook's claim was worded in the same way except that "etc., etc." was inserted after the word "disturbance." Before that offer was accepted by the Corporation, the defendants Cook assigned all their leasehold interest for the residue of the term in No. 2 Duke Street to their under-tenant, the defendant Lane, in consideration of the sum of 1*l*., and on February 2, 1920, Lane entered into a deed of covenant with them whereby (inter alia) he covenanted as follows: (1.) that he "will at all times hereafter save harmless and keep indemnified the said F. H. Cook and E. E. Cook and their respective executors and administrators from any costs, losses, damages, injuries or expenses which the said R. Lane may suffer in consequence of the acquisition of the said premises wholly or partly under the proposed scheme of the Cardiff City Corporation for

acquiring by parliamentary sanction or otherwise howsoever (inter alia) either the whole or part of such premises . . . . for the purpose of the widening of and effecting other improvements in Duke Street aforesaid"; and (2.) that he "will in particular refrain from doing or performing any act or thing which might in any way compromise or adversely affect the claim or claims of the said F. H. Cook and E. E. Cook against the said Corporation for and in respect of the costs incurred by them in removing the said business formerly conducted and carried on by them at 2 Duke Street aforesaid to the premises at present in their occupation at 28 High Street Cardiff aforesaid."

After the assignment, Lane let the ground floor of the premises formerly occupied by the defendants Cook to a tenant at a yearly rental of 700*l.*, and remained in occupation of the upper part hitherto occupied by him, the yearly rental of which had been 100*l.* The rent reserved by the lease which had been assigned to him was 350*l.* per annum, so that the net result was a gain of 450*l.* a year to Lane, and capitalising that sum at 7½ years' purchase, which would have been the length of the term of the lease if he had exercised his option to renew it, Lane on June 20, 1921, sent in to the Corporation a claim for 3375*l.* by way of compensation for his interest in the premises. This compensation the Corporation objected to pay.

On August 4, 1921, the solicitors of the defendants Cook sent a letter (fully set out in the following judgment) to the effect that while they were willing to accept 550*l.* for disturbance, they were no longer in a position to agree the value of the leasehold interest.

The Corporation, on October 3, 1921, informally agreed to the purchase money of the interest of the defendants Cook in the premises being fixed at 550*l.*, and by a memorandum dated February 2, 1922, they formally accepted that claim.

In consequence of the Corporation's refusal of Lane's claim to compensation they were unable to obtain an assignment of the premises, and they then commenced this action for a declaration that the compensation payable in respect of the

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compulsory acquisition of the premises was limited to 550*l.*; specific performance of the contract for the sale of the premises constituted by the notice to treat, particulars of claim and memorandum above mentioned and by a letter from their solicitor; and an order for the assignment of the premises to the Corporation.

Hughes K.C. and *Swords* for the plaintiffs. The Corporation served the defendant Lane with a notice to treat in error, not knowing that he was only a yearly tenant. It is not necessary to serve a notice to treat where a yearly tenant is required to give up possession under s. 121 of the Lands Clauses Consolidation Act, 1845: *Syers* v. *Metropolitan Board of Works* (1); Cripps on Compensation, 6th ed., pp. 68–177, and the compensation payable to him is now assessed by an official arbitrator under the Acquisition of Land Act, 1919. The defendants Cook had power to deal with the premises comprised in the notice to treat after they had received it, but they were not entitled to do anything which would increase the burden on the plaintiffs: *Mercer* v. *Liverpool, St. Helens and South Lancashire Ry. Co.* (2); *Carnochan* v. *Norwich and Spalding Ry. Co.* (3); *Tiverton and North Devon Ry. Co.* v. *Loosemore* (4); *Dawson* v. *Great Northern and City Ry. Co.* (5) The notice to treat constitutes to a certain extent the relation of vendor and purchaser; it is an inchoate contract: *Haynes* v. *Haynes.* (6) The defendant Lane can only stand in the same position as these defendants, as attorney for compensation assessment as at the date of the notice to treat. Their offer to accept 550*l.* has never been withdrawn by them; on the contrary, they still claim it and the plaintiffs have accepted the offer.

Cleveland-Stevens for the defendants Cook. These defendants claimed 550*l.* for the disturbance they had suffered. They put no value on their leasehold interest, but they were

(1) (1877) 36 L. T. 277.
(2) [1903] 1 K. B. 652; [1904] A. C. 461.
(3) (1858) 26 Beav. 169.
(4) (1884) 9 App. Cas. 480.
(5) [1905] 1 K. B. 260.
(6) (1861) 1 Dr. & Sm. 426, 450.

entitled to assign it: *Sewell* v. *Harrow and Uxbridge Ry. Co.* (1), although they could not grant a new interest, but that they have not purported to do. There is no objection to an assignment of purchase money already assessed, or an interest in such money: *Carnochan* v. *Norwich and Spalding Ry. Co.* (2) These defendants are entitled to 550*l.* compensation for disturbance, and no part of that is payable to the defendant Lane, but they cannot be ordered to convey what they no longer have. They acted reasonably and were perfectly justified in assigning their leasehold interest to Lane: *Dawson* v. *Great Northern and City Ry. Co.* (3)

Cunliffe K.C. and *C. A. Bennett* for the defendant Lane. This defendant has no desire to increase the burden on the plaintiffs, but he took a different view from the defendants Cook of the value of the leasehold interest. The plaintiffs are not entitled to a conveyance, because they did not take the proper steps to acquire this defendant's interest in the top floors and compensate him. In *Syers* v. *Metropolitan Board of Works* (4) no notice to treat was served, but the plaintiffs did serve this defendant with notice to treat which, once served, cannot be withdrawn. This defendant's yearly tenancy was then still in existence and unextinguished, although it may have merged on the assignment.

We admit that if their offer had been accepted the defendants Cook could not have done anything afterwards to increase the burden on the Corporation, but their offer was never accepted, and in all the circumstances it must be deemed to have been withdrawn. The ordinary law of contract is not displaced in transactions of this nature except so far as may be necessary to give effect to the drastic powers conferred by the Lands Clauses Consolidation Act, and an offer can be withdrawn before acceptance: *Dickinson* v. *Dodds.* (5) The plaintiffs are seeking to treat Lane as if they had contracted with him, which they are not in a position to do. Lane had power to withdraw the offer, and did so by

(1) (1902) 19 Times L. R. 130.
(2) 26 Beav. 169.
(3) [1905] 1 K. B. 260.
(4) 36 L. T. 277.
(5) (1876) 2 Ch. D. 463.

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sending in a wholly inconsistent claim, and the plaintiffs must now satisfy his claim before they are entitled to a conveyance.

Hughes K.C. in reply.

ROMER J. stated the facts as above set out and, after referring to the particulars of claim sent in by the defendants E. E. Cook and F. H. Cook, continued: Now, it appears to me that the meaning of those claims is quite obvious. They estimated the damage done to them by "disturbance," that is to say, by their compulsory removal, at 550*l.* They treated their leasehold interest as not being worth anything. They were required to give particulars of their estate and interest in the lands and hereditaments referred to in the notices to treat and of the total claims made by them in respect thereof, "specifying separately the amount claimed for value of property and for compensation for loss or injury." It is obvious, to my mind, that what they meant by their claims was, "We are willing to take 550*l.* in respect of the whole of our claim—made up as follows: for disturbance 550*l.*, for value of property nil." That that is so is, I think, quite clear, having regard to a letter which, very shortly after sending in their claims, they wrote to the Town Clerk in response to a request by him to be supplied with details of their claims. In that letter, which is dated January 8, 1920, they pointed out that the leasehold interest was regarded by them as in the nature of a liability. After stating how it was that they arrived at their claim for compensation for disturbance they say: "We are endeavouring to dispose of our liability at 2 Duke Street, but no premium can be obtained and this has not yet been arranged. We consider that with due regard to all the circumstances we are entitled to a sum of 550*l.* as compensation and therefore enter a claim for that amount." Now, had the Corporation then and there agreed to pay them that sum of 550*l.*, I do not doubt that Messrs. Cook and any assignees of theirs would be under a liability to assign the whole of the premises in question to the Corporation in consideration of that sum of 550*l.*, and that they could not have claimed a penny more either in

respect of disturbance or in respect of their leasehold interest. But before their offer to take 550*l.* was accepted, Messrs. Cook assigned their leasehold interest in the premises to Mr. Lane in consideration of a payment to them by Mr. Lane of a nominal sum—1*l.*; and on the same day Mr. Lane entered into a deed of covenant with Messrs. Cook. That deed contained certain covenants by Lane, to two of which it is necessary to refer. [His Lordship read the earlier of the covenants above set out and continued:] That is a covenant by Lane to keep Messrs. Cook indemnified in regard to any costs, losses, damages, injuries, or expenses which Lane may suffer in consequence of the acquisition of the premises in question by the Corporation. That means that he agrees not to make any claim against them in respect of any damage he may sustain by virtue of the acquisition by the Corporation of the premises. Then the deed goes on: [His Lordship read the later covenant above set out and continued:] That means this, I think, that the parties being under some doubt as to what was the precise effect of the assignment, having regard to the notice to treat and the claim made by Messrs. Cook under the notice to treat, wanted to provide that nothing that Lane might or might not do was in any way to prejudice the claim which Messrs. Cook had put forward for 550*l.*, the amount which they estimated they were entitled to as compensation for their disturbance. It is now necessary to consider what was the effect of these transactions as between the three parties to this action. For this purpose it is necessary to ascertain first of all what was the effect of the notice to treat upon the power of Messrs. Cook to deal with their leasehold property. Of the authorities cited to me on this point it is only necessary to refer to *Mercer* v. *Liverpool, St. Helens and South Lancashire Ry. Co.* (1) I want to refer to two passages in the judgment of Stirling L.J. in that case and to one passage in the judgment of Mathew L.J. In giving judgment, Stirling L.J., after stating the facts, first of all quotes with approval what Kindersley V.-C. said in the case of *Haynes* v. *Haynes* (2): "I consider that the

(1) [1903] 1 K. B. 652. (2) 1 Dr. & Sm. 426, 450.

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notice to treat constitutes, as between the landowner and the company, the relation of vendor and purchaser to a certain extent and for certain purposes (that is the language of Lord Cottenham in *Adams* v. *London and Blackwall Ry. Co.* (1)) and that some of the consequences which flow from an actual contract also follow upon the notice to treat; such as that the particular lands which the company are to take, and which the landowner must give up to the company after certain steps prescribed by the Act shall have been taken, are fixed, and that neither party can get rid of the obligation, the one to take and the other to give up the lands specified in the notice; and that such is the meaning to be attributed to those expressions, which may have dropped from learned judges, which seem to intimate that it is a contract; but that in no other sense and to no further extent does the notice constitute a contract, at least on the part of the landowner." Then Stirling L.J., after pointing out that the rights and obligations created by a notice to treat being derived from a statute are legal and not merely equitable, says (2): "Now at law . . . . in accordance with the same principle, it was laid down by Lord Romilly in *Carnochan* v. *Norwich and Spalding Ry. Co.* (3) that the purchase of land in respect of which a railway company has served a proper notice to treat, and in respect of which the company has entered into possession, is 'in truth but the purchase of an interest in the purchase money.'" Mathew L.J., in giving judgment, says (4): "It seems to me that, either when the land is taken or is injuriously affected, the owner cannot derogate from the obligation created by the notice to treat. . . . . In my judgment, in such a case as the present, it must be regarded as a settled rule of law as between landowner and railway company that there can be but one proceeding for compensation, and that after notice to treat no onerous interest, either in the land taken or in that injuriously affected, can be created by the owner to the prejudice of the railway company."

(1) (1850) 2 Mac. & G. 118.
(2) [1903] 1 K. B. 662.
(3) 26 Beav. 169.
(4) [1903] 1 K. B. 667.

Now that case went to the House of Lords (1) and the House affirmed the decision of the Court of Appeal. Lord Lindley, in the course of his speech, said: "The broad principle appears to me to be that it is not competent for an owner of land who has received notice to treat to deal with any of his land either taken or injuriously affected by the company, so as to increase the burdens of the company as regards the compensation to be made in respect of such land or any of it." In these passages the right of a landowner to deal with his property after a notice to treat is recognized, but the right cannot be exercised in such a way as to increase the obligations of the company. It seems to me that it follows that in the present case Messrs. Cook had a right to assign the leasehold interest to Mr. Lane, but they could only assign that interest subject to the rights which had been acquired by the Corporation by virtue of the notice to treat, and by virtue of the claim that had been sent in by Messrs. Cook themselves; in other words I do not think the fact that they had assigned the leasehold interest to Mr. Lane operated as a withdrawal of the offer by them, Messrs. Cook, to accept 550*l.* in full settlement. On the other hand I cannot see that Mr. Lane acquired by virtue of that assignment any less right than Messrs. Cook themselves would have had. It seems to me, therefore, that the assignment to Mr. Lane was effectual to confer upon him the property, subject however to an offer which must now be deemed to be his offer, to accept 550*l.* in full settlement, but together with the right as between himself and the Corporation to withdraw that offer before acceptance if Messrs. Cook had a right themselves to withdraw it at the time that they assigned the property to Lane. No authority has been cited to me in support of the proposition that a landowner, after being served with a notice to treat and putting in a claim for compensation, is not at liberty before his claim for compensation is accepted to amend it. It would be a great hardship if he were not allowed to do that, because he might have put in his claim under some misapprehension. In the absence of authority

(1) [1904] A. C. 461, 465.

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to the contrary I hold that a landowner is entitled before acceptance to withdraw and amend his claim. If, therefore, Mr. Lane, as I apprehend he was, was entitled to the same rights as those that Messrs. Cook had at the date of the assignment, he had the right to withdraw and amend the claim by which, it appears to me, unless withdrawn, he was bound. Now whatever may be the precise meaning of the claim put in by Mr. Lane on June 20, 1921, it at any rate amounts to an intimation to the Corporation that he, Mr. Lane, does not consider himself any longer bound by the offer which was made by Messrs. Cook. For that claim gave notice to the Corporation that whereas Messrs. Cook had valued the leasehold interest of the premises at nil, Mr. Lane valued it at 3375*l.*, and claimed to be paid that sum for his interest. That was necessarily a withdrawal of the offer made by Messrs. Cook to accept a sum of 550*l.* for "disturbance" and nothing for "leasehold interest." That being so, and Messrs. Cook's original offer not having been accepted at that time, it appears to me that there is not any contract between the Corporation and Mr. Lane, who after the assignment to him became the owner of the leasehold interest in the property. But then it is said by the plaintiffs: "We the Corporation have nothing to do with Mr. Lane. The true meaning of the authorities is this, that having served notice to treat on Messrs. Cook, and they having put in a claim for compensation, we have nothing to do with anybody to whom they may have assigned their interest, we can continue to deal with Messrs. Cook in just the same way as if they were still the owners of the property and we can disregard Mr. Lane altogether." I do not think that that is the result of the authorities to which I have been referred. I do not think that after a notice to treat, even when followed by a claim, the undertakers can still continue to treat and ultimately enter into a contract with the owner after he has assigned away the whole of his property. It is admitted that until the offer is accepted and the compensation in this way agreed there is no contract in the usual sense of the term between the undertakers and the owner of the property.

There being therefore no contract in this case at the time of the assignment to Mr. Lane, how is it possible for the Corporation subsequently to make a contract for the purchase of this property with somebody who, at the time of the making of the contract, has ceased to have any legal or equitable interest in the property at all? It does not appear to me to be possible for the Corporation to do that. Mr. Lane, like any other assignee who takes an assignment after the notice to treat, stands in precisely the same position as the person upon whom the notice to treat has in fact been served. By virtue of the assignment he takes the place of the person on whom the notice to treat has been served, and thereupon becomes the person with whom the undertakers have to agree compensation or against whom they must take the necessary proceedings to get the compensation, if it cannot be agreed, ascertained.

But, assuming that the contention of the plaintiffs is right, and that notwithstanding the assignment they could continue to deal with Messrs. Cook entirely regardless of the existence of Mr. Lane, I should then have to consider whether Messrs. Cook themselves ever withdrew the offer which they had made. Now Messrs. Cook had made an offer, which, according to the construction that I have put upon it, was an offer to accept 550*l.* in full settlement of their interest in the premises. But before ever that offer was accepted by the Corporation Messrs. Cook had, in my opinion, made it perfectly clear to the Corporation that they were no longer willing to accept 550*l.* in full satisfaction of their claim for compensation and for the value of the leasehold interest. On August 4, 1921, Messrs. Cook's solicitor wrote to the Town Clerk a letter which so far as material is in these terms: "Our Clients, you will remember, made no claim for the value of the leasehold premises and only claimed 550*l.* for disturbance, and the assignment to Mr. Lane preserved our Clients' rights to claim compensation for disturbance. If Mr. Lane can establish his claim that there was some value in the leaseholds, at the date of the notice to treat, we fear that we cannot compel him to assign the lease until his claim has

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been satisfied. We do not wish to support Mr. Lane's claim in any way, and we venture to suggest that it would simplify the position if the Corporation were to agree the claim for compensation with us at 550*l.*, to be paid when the premises are assigned, and leave Mr. Lane to make such claim, if any, as he can to the value of the lease, which our Clients assigned to him for the nominal consideration of 1*l.* Matters seem to be at a deadlock. You certainly, and probably Mr. Lane, are taking up legal positions which do not seem to be tenable." That letter seems to me to mean this: "True we sent in a claim for 550*l.* and we are still willing to accept 550*l.* as compensation for disturbance, but we are no longer in a position to agree with you in reference to the value of the leasehold premises. That you must settle with Mr. Lane." It seems to me in law that that amounts to a withdrawal of their previous offer. It was quite a different offer from their original offer to accept 550*l.* in full discharge of their claim to compensation. It is now an offer by them to accept 550*l.* as compensation for their own disturbance only, and they say that the value of the leasehold interest "must now be settled between you and Mr. Lane." Assuming they were wrong in asking the Corporation to settle the value of the leasehold interest with Mr. Lane, it seems to me that after that letter it was no longer open to the Corporation to accept the offer Messrs. Cook had previously made as that offer was no longer open for acceptance.

It follows, therefore, from what I have said that in my opinion the plaintiffs must fail in the claim they are making in this action, which is that Mr. Lane shall assign to them the leasehold interest in the premises which he acquired from Messrs. Cook on payment by the Corporation to somebody of 550*l.* and no more. Of course it is now open to the Corporation to proceed in the ordinary way under the Lands Clauses Act to get the compensation to be paid for the land to be assessed. What the position will then be as between Mr. Lane and Messrs. Cook under the covenant to which I have referred I need not consider. Before concluding my judgment I should just like to mention this. A notice to

treat was served upon Mr. Lane by the Corporation some time in 1919, they being at that time, I understand, under the impression that he had a greater interest in the premises than a tenancy from year to year. That notice was subsequently withdrawn—I think in October of last year—and the Corporation say they are entitled to proceed against him under s. 121 of the Lands Clauses Act, 1845. I express no opinion one way or the other as to whether that notice to treat could or could not be withdrawn, because that does not concern the only question which I had to decide in this action, which was whether Mr. Lane could be compelled to assign, on payment of 550*l.*, not the whole of his leasehold interest in this property, but the leasehold interest which he acquired from Messrs. Cook.

Solicitors for plaintiffs: *Smith, Rundell, Dods & Bockett, for Cecil G. Brown, Town Clerk, Cardiff.*

Solicitors for defendants Cook: *Ingledew, Davis & Co., for Ingledew & Sons, Cardiff.*

Solicitors for defendant Lane: *Simmons & Simmons, for Morgan, Scott & Scott, Cardiff.*

R. M.

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Jan. 17.

In re BLAKE'S SETTLED ESTATES.

[1922. B. 2467.]

Settled Land—Capital Moneys—Purchase of Principal Mansion House in Disrepair and lacking Modern Requirements—Electric Light Installation—Repairs—Investment of Capital Moneys in Purchase of Land—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*vii.*).

A suitable mansion house, although much out of repair and deficient in modern requirements, together with 99 acres of land had been purchased for 7500*l.* out of capital moneys by the trustees of a settlement at the direction of the tenant for life in place of the principal mansion house and grounds originally settled but subsequently sold. The tenant for life had obtained expert advice not to give more than 7500*l.* for the property and that an expenditure of 5000*l.* would be necessary to modernize the house and put it in proper repair and condition. Many of the works necessary for that purpose were admittedly authorized improvements within the Settled Land Acts, but the expenditure also included a sum of 1000*l.* for the installation of a system of electric lighting and bells, and of 1280*l.* for general repairs:—

Held, that inasmuch as the tenant for life would have had to pay an enhanced price for the property if the works in question had been executed before the sale to him, an allowance out of capital moneys in respect of the expenditure upon the electric lighting and bells and repairs could be sanctioned under s. 21 (vii.) of the Settled Land Act, 1882, as being in substance a purchase of land in fee simple, but that the allowance in respect of those items must be limited to such a sum to be ascertained by a qualified practical surveyor as he would have advised the trustees to pay in addition to the 7500*l.* if the particular works in question had been executed by the vendor before the sale.

In re Barrington's Settlement (1860) 1 J. & H. 142, and *Earl Cowley* v. *Wellesley* (1877) 46 L. J. (Ch.) 869, applied.

ADJOURNED SUMMONS.

By a settlement dated November 28, 1903, certain real estate was settled to uses and upon trusts under which in the events which had happened the applicant was tenant for life in possession with remainder to his first and other sons as he should appoint and in default of appointment to his son, the infant respondent, in tail male with divers remainders over. The settlement contained provisions dispensing with the necessity of a scheme for authorized improvements under the Settled Land Acts being first submitted to the trustees and empowered the trustees to pay capital moneys in respect of any such improvements to the tenant for life for the time

being without being responsible for the due application thereof.

With one immaterial exception, all the real estate originally comprised in the settlement, including the principal mansion house, had been sold, and with the object of acquiring a suitable residence for the tenant for life of the settled estates, the trustees had recently by the direction of the applicant applied 7500*l.* of the capital moneys in their hands in the purchase of a suitable mansion house with ninety-nine acres of land. The house and outbuildings were deficient in modern requirements and were also in a very bad state of repair, and before purchasing the same the applicant had been advised by expert valuers not to give more than 7500*l.* for the property and that an expenditure of about 5000*l.* would be necessary to provide modern requirements and put the premises in a reasonable and proper state of repair, including such work as a new water supply, drainage, electric lighting and bells, and considerable decoration and general repairs.

The tenant for life took out this summons asking that the respondent trustees might be at liberty out of the capital moneys in their hands to raise and expend the following sums—namely, (*a*) a sum not exceeding 900*l.* for the expense of exploring for water and the construction of a reservoir with the necessary engine, pumping plant, machinery and pipes and other appliances for the supply of water to the mansion house and buildings connected therewith; (*b*) a sum not exceeding 1000*l.* for the installation of electric light and electric bells with the necessary engine, dynamo, accumulators and wiring in the mansion house and premises; (*c*) a sum not exceeding 1631*l.* (of which 350*l.* was attributable to work done on water supply and drainage) for work necessary to put the dwelling house and premises into a reasonable and proper state of repair, including certain additions to the premises; and (*d*) a sum of 500*l.* for laying down a new system of drainage in and to the mansion house and premises.

A. Adams for the applicant. Previous to the passing of the Settled Land Acts trustees who had power to purchase

ROMER J. land in fee simple were authorized to apply further moneys in making a house or buildings suitable, because otherwise they might have asked the vendor to effect the improvements and then paid him a higher price: *In re Barrington's Settlement* (1); *Earl Cowley* v. *Wellesley.* (2) Capital moneys are now authorized to be invested in the purchase of land in fee simple to be settled upon the limitations or trusts of the settlement under s. 21 (vii.) of the Settled Land Act, 1882, and I submit that the same principle applies and that the expenditure on the electric light and bells and on the repairs can be allowed under s. 21 (vii.). The remaining expenditure relates to authorized improvements. The general principles relative to the application of capital moneys in or towards improvements are stated in *In re Lord Gerard's Settled Estate.* (3)

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Spens for the respondent trustees and remaindermen. The respondents are not unfavourable to the application, and admit that items (*a*) (*d*) and 350*l.* in respect of (*c*) are expenditure upon authorized improvements. As to the remaining items the question really is whether they are permanent improvements likely to benefit the remaindermen: *In re Tucker's Settled Estates* (4), and increase the value of the settled land: *In re Lord Leconfield's Settled Estates.* (5) I submit that in respect of these latter items such amount only should be sanctioned as represents the additional purchase money over and above 7500*l.* which a duly qualified surveyor would have advised the purchaser to give if the improvements in question had been executed before the sale.

ROMER J. This is an application by the tenant for life under a settlement made in 1903 that the trustees may be at liberty out of capital moneys in their hands to pay certain sums for the following purposes mentioned in the summons. The first item (*a*) is a sum of 900*l.* for a new water supply to what is now the principal mansion house. It is clear that

(1) 1 J. & H. 142.
(2) 46 L. J. (Ch.) 869.
(3) [1893] 3 Ch. 252.
(4) [1895] 2 Ch. 468.
(5) [1907] 2 Ch. 340.

that is an improvement authorized by the Settled Land Acts, and no difficulty arises as to the allowance of that amount. The second item (*b*) is a sum not exceeding 1000*l.* for the installation of electric light and electric bells with the necessary engine, dynamo, accumulators and wiring in the mansion house and premises. It is clear upon the authorities that such an installation is not an improvement authorized by the Settled Land Acts and the expenditure of capital moneys for that purpose cannot be justified under s. 21 (iii.) of the Settled Land Act, 1882. It is sought, however, to justify it in the present case upon other grounds which I will mention directly.

The third item (*c*) is a sum not exceeding 1631*l.* for work necessary to put the mansion house and premises into a reasonable and proper state of repair including certain additions to the said premises. There is included in the amount specified a sum of 350*l.* representing work done on water supply and drainage which are within the category of improvements authorized by the Settled Land Acts and there is, therefore, no difficulty as to that sum of 350*l.* With regard to the balance, it is admitted that the works which it represents do not come within the category of improvements authorized by those Acts, but it is contended that this expenditure also may be justified in the present case upon the other grounds already referred to. The last item (*d*) is a sum not exceeding 500*l.* for a new drainage system to the mansion house and premises. No difficulty arises in the way of allowing that expenditure.

Now the grounds upon which it is sought to justify the expenditure mentioned in item (*b*) and the balance of the expenditure mentioned in item (*c*) are these. It appears that the whole of the property originally settled, including the principal mansion house, has been sold, with the result that the tenant for life was without any mansion house at all. In those circumstances the applicant, the tenant for life, looked about for a house which could be purchased by the trustees out of the capital moneys in their hands, and he found a house which, while suitable in every other respect,

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was in a very bad state of repair. He consulted his expert adviser, who told him that it would cost some 5000*l.* to put the house into a proper state of repair. Now if the tenant for life had thought fit he could have said to the owner of this house, "Put this house into a proper state of repair and I will then buy it of you." If he had done that, and the house had been bought after the vendor had put it into a proper state of repair, then a considerable portion though not perhaps the whole cost of the work would have been paid out of capital moneys by reason of its being included in the purchase price of the house. But the tenant for life has adopted a different and alternative method; he has said, "I will buy this house from you at its present value and I will myself cause the necessary repairs and alterations to be made"; and having done that, he then says to the trustees: "It cannot matter to you or to the persons interested under the settlement whether I do these repairs myself or whether they are done by the vendor, and if you pay me the sum by which the purchase price of the house would have been increased had the vendor done the improvements, you and the persons entitled in remainder are not in any way affected by the fact that the improvements have been done by me rather than by the vendor." The tenant for life is accordingly now asking that the trustees may pay some of this expenditure out of capital moneys, not because it represents expenditure on improvements authorized by the Settled Land Acts, but because if they make these payments they will in effect be spending the capital moneys pro tanto in purchasing land under s. 21 (vii.) of the Settled Land Act, 1882. In my opinion the trustees will be justified in making such payments as being in substance an application of capital moneys in the purchase of land under that sub-section.

Two authorities have been cited which seem to me to support the proposition that s. 21 (vii.) does justify the trustees in making these payments, or a considerable proportion of them, out of capital moneys in their hands. The first was *Earl Cowley* v. *Wellesley* (1), in which case the trustees

(1) 46 L. J. (Ch.) 869.

of the settled estates had a power of sale and the moneys to be received on any sale had to be invested in the purchase of other lands to be settled to the same uses. The trustees sold various parts of the real estate under the power of sale and then entered into a contract for the purchase of another estate for 20,000*l.*, and it was claimed that further moneys out of the proceeds of sale in the hands of the trustees should be spent in putting into repair the farm buildings and cottages on the purchased estate. In support of this claim it was argued that the case was not the same as making improvements on an estate already in settlement, but that it was in substance the same thing as if the vendor put the buildings in a sufficient state and then recouped himself the outlay by an increase of the purchase money, and *In re Barrington's Settlement* (1) was referred to in support of that contention. As I understand the report, Bacon V.-C. acceded to that argument and decided that the proposed expenditure was a proper investment. Bacon V.-C. therefore was of opinion that the proposed expenditure was justified on the ground that it was an investment of capital moneys in the purchase of other land. In *In re Barrington's Settlement* (1) similar circumstances had arisen, and Wood V.-C. sanctioned the expenditure as is stated in a note at the end of the report. The case came before him first upon a petition under Lord St. Leonards' Act, and the Vice-Chancellor refused to decide the question on a petition and directed a bill to be filed, but he stated his opinion upon the law applicable to the subject as follows: "The settlement gives a power to purchase real estate; and my view is in accordance with the suggestion of Vice-Chancellor Wigram in *Caldecott* v. *Brown* (2), that there can be no difficulty about laying out a portion of the fund, under the sanction of the Court, in permanent and substantial improvements. The repairs may require separate consideration; but if they are upon farm buildings, they would seem to fall under the same principle." Later on he says: "having given the trustees the benefit of my views upon the point, I must leave them to file a short bill, if they should be so

(1) 1 J. & H. 142, 143. (2) (1842) 2 Hare, 144.

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advised, in order to obtain the sanction of the Court." Then the note to the report states that a suit was subsequently instituted in which the expenditure mentioned in the petition was sanctioned. I think that the grounds upon which that expenditure was sanctioned must have been the same grounds as those upon which Bacon V.-C. subsequently proceeded in *Earl Cowley* v. *Wellesley*. (1) It seems to me that following the decisions in *Earl Cowley* v. *Wellesley* (1) and *In re Barrington's Settlement* (2), I am justified in holding, as I do, that the proposed application of capital moneys in payment of part of the moneys claimed can be sanctioned under s. 21 (vii.) of the Settled Land Act, 1882, as being in substance a purchase of land. I will therefore sanction a portion of this expenditure, but a portion only, and for this reason: it does not in the least follow that if the vendor himself had executed these works the value of the land to be purchased—that is, the sum which the trustees would have been advised to give for the land—would have been increased by the full amount of that expenditure. In his affidavit Mr. Trumper, the surveyor, says with regard to the installation of the electric light and bells: "I should have been prepared to advise the tenant for life to pay in addition to the price of 7500*l.* which I advised him to pay for the said premises as they stood a further sum equal to the cost of such installation"; but later on he says: "in my opinion it has increased their value very materially though not to the full amount of the cost of the said installation," and then with reference to the works included under item (*c*) he says: "If the owner of the said house and premises had as part of the arrangement for the sale to the tenant for life done the said work himself, it would have cost him at least the amounts mentioned in the estimates and I should have been prepared to advise him to pay in addition to the said price of 7500*l.* a price materially higher for the said house and premises though not equal to the whole amount paid in respect of such work." The reason is obvious—namely, that the value of the premises is not increased by the full amount of the expenditure on such

(1) 46 L. J. (Ch.) 869. (2) 1 J. & H. 142.

work, and I think that that was what was in the mind of Wood V.-C. in *In re Barrington's Settlement* (1) when he expressed a doubt as to the repairs. Mr. Spens has suggested and Mr. Adams has agreed that the only sum which shall be allowed in respect of these two items (*b*) and (*c*) shall be such a sum as a qualified surveyor would have advised the trustees to pay in addition to the 7500*l.* if those particular works had been executed by the vendor before the purchase. This appears to me to be right.

I will therefore make an order that the trustees be at liberty out of capital moneys in their hands to pay the following sums in respect of works which are improvements within the Settled Land Acts—namely, 900*l.* under item (*a*), 350*l.* under item (*c*), and 500*l.* under item (*d*), and that the trustees be at liberty out of such capital moneys to pay in respect of item (*b*) and the other works comprised in item (*c*) such a sum to be ascertained by a qualified practical surveyor as he would have advised the trustees to pay in addition to the 7500*l.* if the particular works therein mentioned had been executed by the vendor before the sale.

Solicitors: *Wigan, Champernowne & Prescott.*

(1) 1 J. & H. 142.

R. M.

C. A.
1923
Jan. 19, 22, 23, 24; March 26.

CRADDOCK BROTHERS *v.* HUNT.

[1921. C. 5074.]

Vendor and Purchaser—Particulars of Sale—Parcels—Mutual Mistake—Mistake in written Agreement repeated in Conveyance—Rectification of Conveyance—Parol Evidence to vary written Agreement—Specific Performance—Legal Estate taken with Notice—Defendant declared Trustee of Legal Estate—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7.

Where owing to a mutual mistake in reducing a verbal agreement for the sale of land into writing, the written agreement failed to express the real bargain between the parties, and the mistake was embodied in a deed of conveyance, with the result that a piece of land, which had in fact been bought and paid for by the plaintiffs, was wrongly conveyed by the vendors to the defendant, who had notice of the plaintiffs' title:—

Held, by Lord Sterndale M.R. and Warrington L.J. (Younger L.J. dissenting), that the Court since the Judicature Act, 1873, had jurisdiction to rectify the conveyance, notwithstanding that the deed conformed strictly with the written agreement, and although the effect of ordering rectification was to grant specific performance of a written agreement with a parol variation.

Held, also, that the defendant was a trustee of the legal estate for the plaintiffs, and must be ordered to convey it to them.

Olley v. *Fisher* (1886) 34 Ch. D. 367 preferred to *May* v. *Platt* [1900] 1 Ch. 616.

The principle of *Leuty* v. *Hillas* (1858) 2 De G. & J. 110 applied.

Decision of P. O. Lawrence J. [1922] 2 Ch. 809 affirmed.

Held, by Younger L.J., that there was no sufficient evidence of mistake common to the vendors and the plaintiffs; that, assuming the existence of common mistake, the plaintiffs could not have rectification involving specific performance of a written agreement with a parol variation; that to give the plaintiffs rectification would be to infringe the Statute of Frauds, there being no part performance or anything else to take the case out of the statute; that there was no case for rectification of the defendant's conveyance at the instance of the vendors and that to grant relief against the defendant at the suit of the plaintiffs would be an unjustifiable extension of the supposed principle of *Leuty* v. *Hillas* 2 De G. & J. 110.

Appeal from the decision of P. O. Lawrence J. (1)

The action related to the ownership of a piece of land forming part of a yard adjoining a house, which had been bought by the defendant. The plaintiffs alleged that the piece of land in question had been conveyed by common mistake to the defendant, and claimed a declaration that the defendant was a trustee thereof, and might be ordered to

(1) [1922] 2 Ch. 809.

convey the same to the plaintiffs. The case involved the question whether the Court had power to rectify a deed of conveyance which embodied a mistake, which was proved, by parol evidence, to have been made in reducing an antecedent verbal agreement into writing, notwithstanding that the deed conformed strictly with the antecedent written agreement; and whether the Court had jurisdiction by ordering rectification to grant, in effect, specific performance of the contract as rectified.

The following statement of facts is taken from the judgment of Lord Sterndale M.R. :—

"The property in question in the action had belonged to B. D. Rollings, and had been bought and treated by him in the following way: In 1897 he bought in fee simple a plot of land fronting on Powlett Street, Wolverhampton, 24 feet in width and 160 feet in length and containing, according to the conveyance, 432 square yards. It will be convenient to call the plot of land, as P. O. Lawrence J. has done, Plot 1, and to describe it as containing the land coloured blue and brown on the plan in the Statement of Claim (the brown being the piece of land in dispute). Mr. Rollings built on the front part of the land (coloured blue on the plan) adjoining Powlett Street a dwelling house which he occupied. In 1885 he bought another strip of land adjoining Plot 1, 18 feet in width, approximately the same length as Plot 1, and containing 332 square yards. This I call Plot 2. For some years he occupied the house and the land for the purposes of his business as a builder, and so far as appears there was at that time no fence or other division between any part of the two Plots. In or about 1905 he fenced off Plot 2, which is coloured pink on the plan above mentioned, and a part of Plot 1 coloured brown (the piece of land in dispute), from the remainder of Plot 1, which is coloured blue. He still continued to occupy the whole of the two plots for the purposes of his business, and there were probably gates leading from the blue into the brown and also into the pink. There were some buildings used for the purposes of the business on some part of the brown. A few years

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after he had made this division he left the premises and then let the yard to a Mr. Greenstone at a rent of 6*s.* a week. The yard so let to Mr. Greenstone was the whole yard consisting of both the pink and the brown land, and Mr. Rollings at the time he let it blocked up the gates leading from the blue land and left no access from it either to the brown or to the pink. The house with the blue land was let from time to time to different tenants, and at the time of the sale with which this case is concerned, was vacant. None of those tenants had the occupation of any part of the pink or the brown land, and both continued in the occupation of Greenstone until his death, and afterwards in that of his son, who was in occupation at the time of the hereinafter mentioned sale. In 1913 Rollings died leaving as his personal representatives his daughter Mrs. Hinckes and her husband Mr. Hinckes, who in 1920 decided to sell the property. For this purpose they instructed a firm of auctioneers, Messrs. Boswell & Tomkins, and a firm of solicitors, Messrs. Stirk & Company. Mr. Boswell, a member of the firm of auctioneers, inspected the property and drew particulars and posters advertising the sale for July 27, 1920. In the poster the property comprised in Lot 9 was thus described, 'Powlett Street, Lot 9. The very excellently situated freehold property, comprising a dwelling house known as "Powlett House," No. 44, Powlett Street, Wolverhampton, together with the yard immediately adjoining. Vacant possession of "Powlett House" will be given upon completion. Solicitors, Messrs. Stirk & Co., Lichfield Street, Wolverhampton.' This description, though correct, was not full and it was supplemented by that contained in the Particulars. 'Lot 9. The very excellently situated freehold property, comprising a Dwelling House known as "Powlett House," No. 44, Powlett Street, Wolverhampton, together with the Yard immediately adjoining. Vacant possession of "Powlett House" will be given upon completion. The Yard is at present let to Mr. Greenstone, Glass Merchant, at an inclusive rental payable quarterly. The Dwelling House is two-storey brick and slate built with forecourt and covered

cartway entrance at side. The accommodation includes tiled Hall Entrance, two Sitting Rooms, glazed verandah, pantry, kitchen, with range and cupboards; scullery, with sink, boiler and grate; four bedrooms, bathroom, and cellar. Outside there is a part-paved yard, brick built workshop or storeroom and W.C. The yard immediately adjoins at the side and rear, and the wood-shedding and erections thereon belonging to the vendor will be included in the sale.' There are two matters of importance contained in this description, one that vacant possession would be given of the house on completion, but that the yard was let to Greenstone on a quarterly tenancy, and the other that the yard so let adjoined the house both at the side and rear. The position, therefore, was that the yard which was as stated before physically divided from the house consisted of the pink and brown land which were held under different titles, the pink under the Conveyance of 1895 and the brown under that of 1877, and no one who inspected the land or read the particulars could have any doubt that the yard extended behind the house and occupied part of the land behind it. The Vendors sent a letter of instructions to the auctioneer which he received on July 27, 1920, in these terms: 'Dear Sirs, With reference to the sale of Powlett House and Yard this evening I do not know whether you have been informed that the yard is still let at the old 1914 rental of 6*s*. per week and subject to the increase of rates since and also to present allowed increase just passed. If the reserve price is not reached I think they had better be offered separately. House (reserve 700*l*.) and Yard 200*l*. I trust you will be very successful.' There can in my opinion be no doubt that the yard which the auctioneer was instructed to put up separately, if necessary, at a reserve of 200*l*. was the same yard to which the writer of the letter refers as let at 6*s*. a week, and it will be seen that the auctioneer acted on it in that sense. The instructions that Mr. Stirk got were as follows: On July 21, 1920, Mrs. Hinckes brought the deeds to him and this is what he says took place: '(Q.) How did you come to think that that deed related to the whole

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yard or exclusively to the yard? (A.) When Mrs. Hinckes brought me the deeds I undid the parcel while she was there and there were two separate conveyances of two plots side by side. I asked which the house was built on and whether they were separate. She showed me which the house was, and I think I marked it with pencil which the house was, I think I marked one "House," and the other "Yard." It is two years ago, and I cannot remember very much about it. (Q.) On which deed do you think it is marked? (A.) I think I put "Yard" on one and "House" on the other. It would be on the deed with the plots upon it.' It will be noticed that he got no answer to the question whether they were separate and asked no questions as to the extent of the yard or the nature of the property, but as he was told one set of deeds referred to the house, jumped to the conclusion that the deeds relating to the house and those relating to the yard were entirely separate. He had the particulars of sale some days before the auction, and as I have pointed out they clearly stated that the yard was at the rear of the house as well as at the side. The intention was to sell the property in one lot if possible, but if that could not be done the auctioneer had instructions, as I have already mentioned, to sell the house and the yard in two lots, a separate reserve being put on each. The plaintiffs, who had a place of business in the neighbourhood and knew the premises well, were willing to buy the yard if it were put up separately, and the defendant had arranged with a Mr. Thomas that they would buy the house if it could be got for not more than 500*l*. I shall have to discuss later the extent of their knowledge of the premises and its effect on the defendant. Just before the auction Mr. Stephen Craddock, a director of the Plaintiff Company, which is a private company really consisting of his brother and himself, happened to be in the auctioneer's office on other business and seeing Mr. Boswell told him that if the yard were put up separately he would buy it at any price up to 230*l*. Before leaving he gave Mr. Boswell instructions to bid for his firm up to that amount. There was considerable discussion as to the exact words used at this conversation,

particularly as to whether the actual expression 'Greenstone's Yard' was used, but, whatever the words, in my opinion the evidence establishes quite clearly that both Mr. Craddock and Mr. Boswell understood quite well that what the former intended to buy and the latter intended to sell was the yard occupied by Greenstone. Mr. Craddock was not present at the auction but Mr. Thomas and Mr. Stirk were both there. The property was at first put up in one lot and no bid was obtained. It was then withdrawn and the house put up separately. There is some controversy as to whether there was any bid, but at any rate, it was not sold and the yard was then put up separately and in the hearing of Mr. Thomas was knocked down to the plaintiffs for 230*l.*, the auctioneer bidding for them. Mr. Thomas then asked Mr. Stirk what was the reserve for the house and was told 700*l.* He said he could give 500*l.*, and Mr. Stirk said he did not think it would be of much use but asked Mr. Thomas to leave a business card. He did so and the next morning he got a telephone message asking him, if the offer were still open, to send round 10*l.* deposit. On this Mr. Thomas put the matter into the hands of his solicitor, Mr. Hayward, and eventually bought the house for 500*l.* Great stress is laid by the defendant upon the fact that when the auctioneer put up the yard separately, he did not mention the boundaries or the extent of it, or describe it as the yard in Greenstone's occupation. I think the evidence shows that he did not, at any rate it does not show that he did. As events turned out probably some difficulties would have been avoided if he had mentioned these things, but I do not think any one can blame him for not doing so. He had in the particulars, to which the poster referred intending purchasers, quite accurately described the yard and the house, the division between them was quite plain to any one who looked at the property, and I do not think the auctioneer was bound to assume that such information must be given all over again, because neither those concerned with the sale nor intending purchasers had taken the trouble to acquaint themselves with circumstances, of which the means of knowledge was so easily open to them. This was certainly

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the case with regard to Mr. Stirk, and the defendant and Mr. Thomas allege that they were in the same state of ignorance; whether that is the fact or not is a question which I shall have to decide later. It appears from a copy of the Conditions of Sale produced on the hearing that Mr. Hinckes, no doubt on information from the auctioneer, signed a memorandum of contract in the following terms: 'Memorandum that Kate Catherine Hinckes and John Hinckes both of Wolverhampton are the vendors and Craddock Brothers, Boot Manufacturers of Wolverhampton, are the purchasers, and the highest bidders for, and were declared the purchasers of the property described as Lot 9 in the before-mentioned Particulars at the price of 230*l.* and on the terms of the foregoing special and general conditions so far as the same are applicable to a sale by private contract, and the said Craddock Brothers have paid a certain sum by way of deposit and agree to pay to the vendors or their Settled Land Act Trustees, according to the foregoing conditions, the balance of the purchase money, including the valuation money (if any) and the vendors and the purchasers hereby respectively agree to complete the said sale and purchase according to the said conditions.' I think that is signed by Mr. Hinckes, at any rate, it is signed by one of the Hinckes. It is dated July 27, 1920, but there is no evidence as to when it was actually signed. It, however, entirely confirms the conclusion to which I have come upon the evidence of Mr. Stephen Craddock and Mr. Boswell, that what the latter meant to buy for the former on his instructions, and what he meant to sell for the vendors was the yard as let to Greenstone. It also shows that in doing so he was acting in accordance with the instructions of the vendors. It is at this point that the difficulties begin. Mr. Stirk knowing that the yard had been sold to the plaintiffs, and having sold the house to the defendant, made out contracts to carry out these bargains and they are as follows: 'An agreement made the 29th day of July 1920' between the Hinckes and Messrs. Craddock Brothers: 'The vendors agreed to sell and the purchasers agreed to purchase at the price of 230*l.* all that plot of land

situate in Powlett Street Wolverhampton aforesaid to which it has a frontage of 6 yards and containing in the whole 332 square yards or thereabouts and also such erections thereon as belong to the vendors which premises are now in the occupation of Mr. Greenstone' then 'The title shall commence with an Indenture dated the 23rd day of December 1885 and made between John Davis of the one part and Benjamin Davis Rollings of the other part.' The contract with the defendant is: 'The vendors agree to sell and the purchaser agrees to purchase at the price of 500*l.* all that plot of land situate in Powlett Street Wolverhampton having a frontage to the said street of 8 yards and containing in the whole 432 square yards and also that messuage and outbuildings now standing and being on the said land and known as 44 Powlett Street aforesaid which said messuage is now void' then 'The title shall commence with an Indenture dated the 20th day of March, 1877, and made between the Honourable Edward Stanhope and Henry Morgan Vane of the first part the Duke of Cleveland of the second part and Benjamin Davis Rollings of the third part.' It will be noticed that the 332 yards mentioned as the extent of land purchased by the plaintiffs and the 432 as that purchased by the defendant, if correct, give to the plaintiffs only the pink land and to the defendant the blue and the brown, so that the plaintiffs do not get the whole of the yard occupied by Greenstone, and the defendant does get part of it. These measurements were taken by Mr. Stirk from the deeds which he had marked 'House' and 'Yard' respectively some days before as he jumped to the conclusion that the house and yard sold after and at the auction corresponded to the land which was described in those deeds. It is no part of my duty to criticise Mr. Stirk but it does seem from the undisputed facts to be clear that if he had asked for any information however simple when the deeds were brought to him, at the auction, or at the time of preparing the contracts the difficulty would never have arisen. I do not know whether he saw the memorandum of contract signed by Mr. Hinckes, but he says that he must have read the particulars, and admits that if

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he had read them correctly he would have known that Greenstone's yard extended behind 44 Powlett Street. If he had known that he could not have drawn the contracts as he did.

"The contract with the defendant went through in the ordinary course and that with the plaintiffs was sent to them and signed by Mr. George Craddock, the brother of Mr. Stephen Craddock, who had instructed Mr. Boswell. Mr. George Craddock had known nothing about the matter before but went down to Mr. Stirk's office, paid the deposit, and either there or at his own office signed the contract. He may have been satisfied with the words 'which premises are now in the occupation of Mr. Greenstone' and taken no notice of the measurement, but if one director was going to make the bargain and another attend to the documents carrying it out, it would seem as if a little more communication between them than the evidence in the case shows would have been wise. Some time later a tracing of the pink land was sent to the plaintiffs' solicitors, in consequence of a requisition on title asking for a tracing of the plan referred to in the deed of 1885 appearing in the abstract.

"The conveyances followed the contracts in each case, though the conveyance in the plaintiffs' case makes it plainer than in the contract that the plaintiffs only get the pink land. This appears from the description of the boundaries.

"The defendant went into possession of the house and the blue land very soon after the conveyance but the plaintiffs could not get possession of the yard until after the termination of Mr. Greenstone's tenancy. This was terminated by notice given by the plaintiffs which expired on December 25, 1920. The plaintiffs received the two quarters' rent due at Michaelmas and Christmas for the whole yard and on the expiration of the notice they took possession of the whole yard. They had on the completion of the purchase of the yard in accordance with the completion account, rendered to them by Mr. Stirk, paid to the vendors the apportioned part of the whole rent of 6*s*. from the last quarter day down to the date of completion. During the whole of this time no claim to the possession of the brown land was ever made by the

defendant nor did he ever make any claim to any part of the rent paid by Greenstone. This, however, would have been a very small sum and not of very great importance. In the Spring of 1921 the plaintiffs instructed their architect to erect some buildings upon the brown land, and on inspection of the deeds and plans the architect discovered that according to them the plaintiffs had no title whatever to that land. Negotiations thereupon took place between the vendors the plaintiffs, the defendant and Thomas, the result of which was that the vendors in consideration of an indemnity given to them by the plaintiffs conveyed to them the brown land but the defendant and Thomas declined to join in the conveyance and maintained their title to that land. Of course if the defendant had acquired a good title to that land in 1920 this conveyance could have no effect, and I think it is only of importance as showing that the vendors recognized that a mistake had been made and did not object to a rectification of the contract and conveyance to the plaintiffs so far as they were concerned. The question in these circumstances is whether the learned Judge was right in ordering the defendant to execute a conveyance to the plaintiffs of the brown land and what are the plaintiffs' rights as against the defendant."

P. O. Lawrence J. gave judgment for the plaintiffs. (1)

The defendant appealed.

Ward Coldridge K.C. and *L. Mossop* for the appellant. On construction the plaintiffs' agreement did not relate to the disputed piece of land. The superficial area of the land sold to the plaintiffs was correctly stated in the agreement, and it did not correspond with the area which would have been comprised if the brown portion of the yard alleged to have been bought by the plaintiffs was included in the agreement.

If common mistake be assumed the Court has no power to rectify the conveyance, which followed strictly the antecedent written agreement: *May* v. *Platt*. (2)

(1) [1922] 2 Ch. 809. (2) [1900] 1 Ch. 616.

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P. O. Lawrence J. held that the case was covered by the decision in *Leuty* v. *Hillas* (1), but that case is in strong contrast with the present case.

As to common mistake, none was established between the defendant and his vendors, and any evidence of mistake between the plaintiffs and their vendors does not come up to the standard required by the Court in granting relief. Parol evidence is admissible to show the common mistake of both parties in reducing the contract into writing, and as the ground for rectifying it. But in order thus to procure the rectification of a contract, the proof must be clear, irrefragable, and the strongest possible: Fry on Specific Performance, 6th ed., p. 373; *Marquis of Townshend* v. *Stangroom*. (2)

P. O. Lawrence J. declined to follow *May* v. *Platt* (3), but that case was rightly decided. There cannot be rectification of a conveyance following upon a written contract on the ground of common mistake founded upon parol evidence: see also *Woollam* v. *Hearn*. (4)

In *Squire* v. *Campbell* (5) Lord Cottenham L.C. said: "It is a familiar doctrine in this Court, that, although to resist a specific performance, a Defendant may shew, by parol, that the written document does not represent the contract between the parties, yet a Plaintiff cannot have a decree for a specific performance of a written contract, with a variation, upon parol evidence. . . . . How much stronger is the objection where the contract has been carried into execution, a deed executed, and the estate conveyed."

The principle is stated in *Murray* v. *Parker*. (6) Romilly M.R. there said: "In matters of mistake, the Court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised, in all cases, where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether parol or written; if there be no previous agreement in writing, parol

(1) 2 De G. & J. 110.
(2) (1801) 6 Ves. 328, 333.
(3) [1900] 1 Ch. 616.
(4) (1802) 7 Ves. 211 (*b*); 2 Wh. & T. L. C., 8th ed., 517.
(5) (1836) 1 My. & Cr. 480.
(6) (1854) 19 Beav. 305, 308.

evidence is admissible to show what the agreement really was; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to explain it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument."

The result of the authorities is that a clear unambiguous written contract and conveyance cannot be rectified on the ground of common mistake: *Davies* v. *Fitton*. (1) That case was the foundation of *May* v. *Platt*. (2) It is said that in *Olley* v. *Fisher* (3) North J. was of opinion that since the Judicature Act, 1873, s. 24, sub-s. 7, the Court has jurisdiction to admit parol evidence to rectify a written contract and to grant specific performance of the contract so rectified.

But in *Britain* v. *Rossiter* (4) Brett L.J. said: "I think that the true construction of the Judicature Acts is that they confer no new rights: they only confirm the rights which previously were to be found existing in the Courts either of Law or of Equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure:" see also *British South Africa Co.* v. *Companhia de Moçambique* (5) and *Lyell* v. *Kennedy*. (6)

In *Thompson* v. *Hickman* (7) *May* v. *Platt* (2) was no doubt criticized, though followed, by Neville J. It has not been departed from for twenty years.

[They also referred to *Stedman* v. *Collett* (8); *Henkle* v. *Royal Exchange Assurance Co.* (9); *Baker* v. *Paine* (10); and *Hodgkinson* v. *Wyatt*. (11)

Jenkins K.C. and *F. K. Archer* for the respondents. As between the respondents and the vendors there would be a clear case for rectification. The vendors have practically admitted it by executing a conveyance of the brown land to the respondents.

(1) (1842) 2 D. & War. 225, 232.
(2) [1900] 1 Ch. 616.
(3) 34 Ch. D. 367.
(4) (1879) 11 Q. B. D. 123, 129.
(5) [1893] A. C. 602, 628.
(6) (1882) 20 Ch. D. 484, 491.
(7) [1907] 1 Ch. 550.
(8) (1854) 17 Beav. 608.
(9) (1749) 1 Ves. Sen. 317.
(10) (1750) 1 Ves. Sen. 456.
(11) (1846) 9 Beav. 566.

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[YOUNGER L.J. They did that upon an indemnity.]

No doubt the respondents must prove their case against the defendant. The Statute of Frauds has nothing to do with the case, or, if it has, there has been part performance sufficient to take the case out of the statute. The authorities are all collected in White and Tudor's Leading Cases, in the notes to *Woollam* v. *Hearn* (1): see also Williams on Vendor and Purchaser, 2nd ed., pp. 788, 790.

It is said that you cannot reform a deed founded upon a written contract with a parol variation. It is submitted that is erroneous: *Thompson* v. *Hickman* (2), where *May* v. *Platt* (3) was criticised, and *Olley* v. *Fisher* (4), which was not cited in *May* v. *Platt* (3); see also Fry on Specific Performance, 6th ed., p. 381.

The learned judge was justified in finding that the defendant did not expect to get more than the blue land, until, through the discovery of the plaintiffs, the mistake was brought to his notice. The defendant knew that Greenstone's yard extended to the rear as well as to the side of the house. When the contract was signed Thomas the defendant's agent knew that the house did not include the brown land. The judge's finding on this point was correct.

[LORD STERNDALE M.R. Upon what ground does the judge order reconveyance on his alternative findings ?]

The defendant was not a bona fide purchaser for value without notice. He knew through Thomas that the plaintiffs had at the auction purchased Greenstone's yard. The plaintiffs have bought and paid for the whole of the yard, and the defendant has got a conveyance of a part of it. He has, through Stirk's blunder, at the expense of the plaintiffs got something which he never intended to buy or thought he had bought. He is not entitled in equity to keep it, and has been rightly ordered to reconvey it to the plaintiffs. As to the Statute of Frauds, where it is no bar—e.g., where there has been part performance—the Court can rectify the agreement

(1) 7 Ves. 211 (*b*); 2 Wh. & T. L. C., 8th ed., 517.
(2) [1907] 1 Ch. 550.
(3) [1900] 1 Ch. 616.
(4) 34 Ch. D. 367.

on parol evidence and can if necessary grant specific performance of the agreement as rectified: Ashburner's Principles of Equity, pp. 382, 383.

[They also referred to *Maddison* v. *Alderson*. (1)]

Ward Coldridge K.C. in reply referred to Dart on Vendors and Purchasers, 6th ed., pp. 806, 908, and *Pember* v. *Mathers*. (2)

Cur. adv. vult.

March 26. LORD STERNDALE, M.R. [after stating the facts as above set out:] The first question is whether the contract with the plaintiffs as drawn by Mr. Stirk did include the brown land. The learned judge has held that it did and that the statement of the measurement of the land as 332 yards was merely a falsa demonstratio. On that construction and on the facts as found by him he has held that within the principle of *Leuty* v. *Hillas* (3), the defendant must convey the brown land to the plaintiffs. If I agreed with the learned judge's construction of the agreement I should not differ from his conclusion. I regret, however, that I cannot do so. I think the area of 332 yards, which Mr. Stirk no doubt took from the deed of 1885, was the governing description in the contract. There were no boundaries given, and the statement that the premises are now in the occupation of Mr. Greenstone is just as apt to part of the yard as to the whole. The stipulation as to the commencement of the title points in the same direction. On this point, therefore, I cannot agree with the learned judge. There is, however, another ground on which he has decided against the defendant. He has not in terms stated the ground, but I think it may be shortly stated as being that upon the true results in fact and law the brown land had been bought by the plaintiffs, that the defendant knew that fact from the beginning, that he knew he had not bought it, and took the contract and conveyance that purported to give it to him with notice that it belonged to the plaintiffs. It is on these

(1) (1883) 8 App. Cas. 467, 475. (2) (1779) 1 Bro. C. C. 52.
(3) 2 De G. & J. 110.

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grounds that I think P. O. Lawrence J. has decided against the defendant. This latter ground seems to me to raise serious questions of fact and law. First, are the plaintiffs entitled to say that they have bought the brown land and have a title to it as against the vendors? If the construction which I have put upon the contract is right it is necessary as a first step to show that the plaintiffs, as against the vendors, are entitled to have the contract and conveyance rectified. I think there is ample ground in fact for asking for such a rectification. I have already said that the vendors, if the yard were sold separately, instructed the auctioneer to sell the whole yard let to Greenstone for 6*s*. a week, that Stephen Craddock instructed the auctioneer to buy the whole yard, that the auctioneer understood those instructions, and that, when it was knocked down, the auctioneer intended to buy for the one party and sell for the other the whole yard. The memorandum signed by one of the vendors shows that he so understood the transaction. The contract was wrongly drawn so as not to include the brown land by a careless blunder on the part of Mr. Stirk, and accepted by Mr. George Craddock as carrying out what he believed to be the bargain. It seems to me as clear a case of mutual mistake as could occur and, if there be no legal difficulty in the way, I think the plaintiffs could claim rectification of the contract and conveyance in a suit against the vendors. They, however, are not parties to this action, but I think that is not material, because, as I have already mentioned, their execution of the conveyance of 1921 seems to me to be an assent to such a rectification. The defendant, however, contends that in law there cannot be such a rectification. He alleges, as I understand, two grounds for this contention: (1.) That in no case can there be a rectification of a complete written agreement in accordance with a previous parol agreement; and, (2.) that even if that proposition cannot be maintained at large it is correct where the subject matter of the agreement is such that by reason of the Statute of Frauds an agreement, to be binding, must be in writing.

The first contention is mainly supported by the authority

of *Woollam* v. *Hearn* (1); *Davies* v. *Fitton* (2); and *May* v. *Platt*. (3) These cases are said to establish that where a conveyance has been executed in accordance with a previous written agreement, that agreement and the subsequent conveyance cannot be rectified, because, to do so, would be to grant specific performance of a written agreement with a parol variation, which cannot be done. These cases are not all cases of rectification, but I think they do go to the extent for which the appellant contends, and, if they stood alone and without criticism, I should not feel justified in differing from them. This, however, is not the case; the decisions have not received universal approval, and there are cases in which a different rule has been applied. Evidence for the purpose of such rectification has been held admissible in *Thomas* v. *Davis* (4); *Olley* v. *Fisher* (5); and *Shrewsbury and Talbot Cab Co.* v. *Shaw*. (6) The earlier cases, including *May* v. *Platt* (3), in which neither of the last two cases was cited, have been adversely criticised by Neville J. in *Thompson* v. *Hickman*. (7) Opinions as to the rule established by these cases have also been expressed in Fry on Specific Performance, 2nd ed., s. 799, 6th ed., pp. 379–382 and 815–819; and Williams on Vendor and Purchaser, vol. i., 2nd ed., pp. 788–791. The cases are all discussed in these passages, which also show that the rule is contrary to opinions expressed by Story J. and Chancellor Kent. In these circumstances I think I am at liberty, at any rate since the Judicature Act, 1873, to express my opinion that rectification can be granted of a written agreement on parol evidence of mutual mistake, although that agreement is complete in itself, and has been carried out by a more formal document based upon it. I think the contrary view is based upon an insufficient consideration of the result of rectification. After rectification the written agreement does not continue to exist with a parol variation; it is to be read as if it had been originally drawn in its rectified form: *Johnson* v. *Bragge* (8), and it is

(1) 7 Ves. 211.
(2) 2 D. & War. 232.
(3) [1900] 1 Ch. 616.
(4) (1757) 1 Dick. 301, 303.
(5) 34 Ch. D. 367.
(6) (1890) 89 L. T. J. 274.
(7) [1907] 1 Ch. 550.
8) [1901] 1 Ch. 28, 37.

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that written document, and that alone, of which specific performance is decreed.

The second argument is that though such rectification may take place in a case such as *Shrewsbury and Talbot Cab Co.* v. *Shaw* (1), where the original contract need not be in writing, it is otherwise where the Statute of Frauds requires a memorandum in writing in order to constitute an enforceable contract. I think in this case there is good ground for saying that the statute has no application, because there was part performance by the plaintiffs through taking possession, but apart from that I think the cases and passages from text writers to which I have referred show that the contention is not well founded: see *Johnson* v. *Bragge*. (2) The ground of this is not stated so far as I know in any case, but I think it must be founded on this, that when the memorandum has been rectified the signatures must be taken as affixed to that document. The apparent limitation put upon this by the last words of North J.'s judgment in *Olley* v. *Fisher* (3) in every case in which the Statute of Frauds does not create a bar (words taken from Fry on Specific Performance, 2nd ed., p. 799) relate only, in my opinion, to a case where the document, when rectified, is not such as to satisfy the statute. The result is that, in my opinion, the plaintiffs are entitled as against the vendors to rectification of both the contract and the conveyance and have as against them a good title to the brown land. I have already explained why I do not think the vendors necessary parties to the action.

It now remains to consider the difficult question whether the plaintiffs have any and what rights as against the defendant. In order to decide this question it is necessary first to ascertain the facts as regards the defendant. It is clear, I think, that the contract between him and the vendors must be treated as subsisting. I do not think it necessary to discuss the question whether the vendors in a properly constituted action brought by them could or could not rectify that contract; I see considerable difficulties in the way of such

(1) 89 L. T. J. 274. (2) [1901] 1 Ch. 28, 37.
(3) 34 Ch. D. 367.

an action, but I do not decide that they could not be overcome. This, however, is immaterial, for it is quite clear that the contract cannot be rectified in this action at the instance of the plaintiffs and in the absence of the vendors. Speaking generally I agree with P. O. Lawrence J. that the defendant and Mr. Thomas bought with a knowledge that the yard as occupied by Greenstone was bought by the plaintiffs and that they did not, either of them, think that they had bought the brown land, but I think it well to state my own reasons for so finding. They knew that the auctioneer was selling the house and yard as they in fact existed at that time and that the house and yard were in different occupations. They must therefore be taken to know that when the auctioneer after putting up the two in one lot put them up separately, what was put up was the house as it then existed and the yard as it then existed. But they knew more than that. Thomas, when he went to view the property, saw that the backyard of the house ended in a series of sheds. It is true that he says he thought they were not the end of the property, but he had no reason to think so, and I come to the conclusion that he must have known that was the boundary between the house and Greenstone's yard. He had no reason to think that the backyard of the house went any further, though there was an attempt made at the trial to show that he thought so, because he thought all the houses in Powlett Street extended further back. Unfortunately when he was asked if he knew how far those other houses in the street went back his answer was "No," instead of the desired and perhaps expected answer, "Yes." All he knew therefore was that he was buying the house with an unknown amount of ground at the back, and that so far as he could see the ground at the back was bounded by a row of sheds, which might be sheds belonging to the builder who to his knowledge had the adjoining yard. The defendant himself says that he could see the end of the property and that it ended in his wooden sheds about four feet from one another and a bit of wood fencing between that he thought the part beyond had been fenced off as he says in order to let it

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to some one else. He also said that he knew Greenstone was the tenant of that bit as well as the bit at the side. It is true that he says that he thought he had bought that bit, but I think the evidence and his subsequent conduct shows he thought nothing of the kind. In the absence of evidence to the contrary I must assume the truth of the statement that Thomas and the defendant did not read the particulars, and considering the very careless way in which nearly every one concerned in the matter conducted themselves it may very likely be true, but Thomas, at any rate, had seen the poster on which it appeared in large letters that vacant possession of Powlett House would be given on completion, and he says that it was necessary that the defendant should have vacant possession of something. I think the defendant's evidence shows that he thought he ought to have vacant possession of what he had bought, for he says that he thought it wrong that Greenstone should be in occupation of the brown land after he, the defendant, had completed his purchase. Yet, as I have already pointed out, he made no attempt to get possession, he never communicated with the vendors or with Greenstone or the plaintiffs, and allowed Greenstone to remain without even asking for any part of the rent he was paying for the yard. Indeed he took no steps to assert his right to this land till many months after he had gone into possession and some time after the plaintiffs had found out that there was a mistake. It is true that he says that he made some remark to his wife when he found that he had not got possession of the brown land. The learned judge did not believe this nor do I. He says that he told her he was surprised to find the ground was fenced up in that position, whereas he admits that he saw that very fencing before he bought. If he had however said anything to his wife it would not, in my opinion, at all lessen the effect of his conduct in saying nothing to the vendors or Greenstone or the plaintiffs. Such conduct is, in my opinion, entirely inconsistent with any belief that he had bought the brown land, and for the reasons I have given I consider the position to be as follows: the defendant and Thomas knew that the

auctioneer was selling the house and the yard as they existed, and as they were physically divided. Thomas who was treated throughout the case as the defendant's agent knew that the yard had been knocked down to the plaintiffs, though he did not know, for it was not the fact, that they had entered into any binding contract within the Statute of Frauds. With that knowledge he on behalf of the defendant made an offer for the house, and he and the defendant never thought that they had bought more than the house as it was, and never thought they had bought any of the brown land, but when the plaintiffs discovered the mistake, and the defendant discovered that he had a paper title to it, he determined to keep it if he could. Thomas apparently was willing to put the matter right if he could get the defendant's consent, but the latter refused.

It seems to me that the question is whether if on these facts the defendant ought to be held in equity to be a trustee of the brown land for the plaintiffs. The learned judge must, I think, on this branch of the case as on the former, have held that he ought, but he has not given his reasons for so holding. It does not seem to me that the case is brought within the direct authority of *Leuty* v. *Hillas* (1), where the facts were quite different, but I think it comes within the principle which seems to me to underlie that case. I can see no conscience or honesty in the defendant's claim and I think he should be declared a trustee for the plaintiffs of land, to which he has by mistake got a title, which he knew had been knocked down to them, and which he never thought was intended to be sold to him or had been bought by him.

The appeal must be dismissed with costs.

WARRINGTON L.J. This is an action of an unusual character. It arises out of a dispute between two purchasers from the same vendor of adjoining pieces of land. The parcel in dispute contains according to one description 189 square yards, according to another 165 square yards, but this discrepancy is not material, there being no question what the

(1) 2 De G. & J. 110.

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actual parcel of land is. The plaintiffs' case is that it was to the knowledge of all parties comprised in their purchase and paid for by them and was neither bought nor paid for by the defendant, that it was by mistake omitted both from the plaintiffs' contract and from their conveyance and included in those of the defendant; that the defendant on the mistake being pointed out to him wrongfully refused to put the matter right, insisting on retaining that to which he was not entitled, and accordingly that although he has obtained a conveyance of the legal estate he ought to be declared a trustee thereof for the plaintiffs and ordered to execute a conveyance of the parcel of land to the plaintiffs. P. O. Lawrence J. has accepted the plaintiffs' view and ordered the defendant to execute a conveyance of the land to them. The defendant appeals.

The learned judge indeed has held that according to the true construction of the plaintiffs' contract the disputed parcel is included therein though not in their conveyance, but he has said that even if this were not the true construction his ultimate decision would have been the same. With all respect to him I cannot take the same view of the construction of the contract; I think it is reasonably clear, especially having regard to the stipulation as to commencement of title, that the description in the contract does not include the land in question, and my judgment proceeds on the footing that both in the contracts and in the conveyances such land purports to be excluded from the plaintiffs' purchase and included in the defendant's.

The facts are stated in detail by the learned judge and have been stated also by the Master of the Rolls, and I propose to state them very shortly, adopting the findings of the learned judge, which are, in my opinion, correct. The vendors were the legal representatives of one Rollings. Rollings was at his death the owner in fee simple of two adjoining plots of freehold land on the south side of Powlett Street, Wolverhampton, which I will call Plots 1 and 2. He bought Plot 1 in 1877 and built thereon a house called Powlett House. He bought Plot 2 in 1885 and used this as a yard in connection with his business adding to it for this purpose the land in question,

being the northern portion of Plot 1, which he separated from the latter plot by some sheds and a fence forming together a complete physical boundary between the land used with the house and that used with Plot 2. Between this last piece of land and Plot 2 there was no such boundary. Some years before his death Rollings let the yard including the piece in dispute to one Greenstone, and at the time of the sale the whole of the yard was in the possession of Greenstone's successor and was known as "Greenstone's Yard." On July 27, 1920, the entire property was put up for sale by auction in one lot, the auctioneer being instructed that in the event of its not being sold as a whole he was to put up the house and the yard separately. The vendors intended and the auctioneer understood that the disputed land was to be put up as part of the yard. Separate reserves for house and yard were fixed. The sale was attended by one Thomas, between whom and the defendant it had been arranged that if possible he should buy Powlett House for the defendant at 500*l*. The defendant and Thomas at this time had seen the house, and I am satisfied that the judge was right in holding that neither the defendant nor Thomas on his behalf had any intention of buying anything except Powlett House, and the land held with it up to and not beyond the physical boundary above referred to, and in particular had no intention of buying any part of Greenstone's Yard. The property was not sold as a whole; thereupon the auctioneer put up Powlett House, but the reserve was not reached and it was withdrawn. He then put up the yard, which in the presence of Thomas was knocked down to the plaintiffs on a bid of the auctioneer, who had been instructed by them in that behalf, but no memorandum of the purchase was signed by any one on their behalf. The next day the two contracts were signed. By a mistake common to everybody concerned, the origin of which is clearly described by the learned judge, that signed by the solicitors for the defendant included the whole of Plot 1, whereas that signed by the plaintiffs comprised Plot 2 and nothing more. The conveyances to the plaintiffs and the defendant, which were dated respectively September 2 and 3,

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1920, followed the two contracts, and thus the land in dispute was conveyed to the defendant. Upon completion the defendant took possession of Powlett House, but allowed the entire rent for the yard to be paid to and received by the plaintiffs. I am satisfied that the defendant never thought of making any claim to the land in dispute until in the spring of 1921 the plaintiffs having had occasion to consider the effect of their conveyance discovered the mistake and requested the defendant to put matters right. This he refused to do. The vendors executed for what it was worth a conveyance of the land in dispute to the plaintiffs. I am satisfied that the defendant entered into the contract, paid his purchase money and took his conveyance in the belief shared in by the vendors, that the land in question was not included in his purchase and with the knowledge, through his agent Thomas, that the yard, including that part of Plot 1 which was beyond the physical boundary above mentioned, had been bought by the plaintiffs in the sense that all the land not put up with Powlett House, including therefore the piece in question, had been knocked down to them. Under these circumstances I am of opinion that he would not be allowed in a Court of equity to assert his legal title against the plaintiffs and that the learned judge was right in so holding. In my opinion the case comes within the principle of *Leuty* v. *Hillas*. (1) It is true that in that case the mistake was in the conveyances only, the two contracts accurately describing in each case the property actually bought. But this in my view is mere detail. It happened to be easier in that case to prove what each purchaser had actually intended to buy. Here the plaintiffs have, in my opinion, established this point by the clearest evidence, and that being so the same principle applies. The defendant has accidentally got something which he has neither bought nor paid for, and he had notice that the vendor did not intend to sell to him, for he knew, as I have said, that so much of the property as was not included in what he intended to buy was knocked down to the plaintiffs. The principle applicable to *Leuty* v. *Hillas* (1) and to the present

(1) 2 De G. & J. 110.

case is, in my opinion, that under which a man acquiring a legal estate with notice that another had a better claim thereto cannot in a Court of equity be allowed to insist on his position at law, but will be treated as a trustee for the person rightfully entitled, and be, if necessary, ordered to convey the estate to him. Strictly speaking I think there is no necessity for actual rectification of the plaintiffs' conveyance, but the point is not of very much importance, inasmuch as it would require practically the same evidence to fix the defendant with a trust as to entitle the plaintiffs to rectification. Much time, however, was spent in discussing the extent of the equitable doctrine of rectification under which a written contract or other document, which, by a mistake common to both parties, fails to carry into effect their antecedent bargain may be rectified so as to conform thereto; and in particular whether the Statute of Frauds is an obstacle to such rectification where the subject matter is the sale of land. The learned judge has expressed the view, contrary to the opinion of Farwell J. in *May* v. *Platt* (1), that the Statute of Frauds does not in such a case prevent the rectification of the contract or the conveyance, and although in the view I take it is unnecessary to determine this point, still in deference to the arguments addressed to us I think it right to say a few words upon it.

The jurisdiction of Courts of equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and the common intention of embodying or giving effect to the whole of that contract by the writing, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon or omitted something that was agreed upon, or otherwise departed from its terms. If these conditions are fulfilled then it seems to me on principle that the instrument so rectified should have the same force as if the mistake had not been made, in which

(1) [1900] 1 Ch. 616.

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case the Statute of Frauds would be no defence to an action founded upon it. The authorities on this point are so fully stated and discussed by the learned judge that I think it is unnecessary for me to review them again. I would, however, add a reference to two cases in which a marriage settlement has been rectified on parol evidence of mistake—namely, *Johnson* v. *Bragge* (1) and *Hanley* v. *Pearson* (2), and to *Cowen* v. *Truefitt* (3), in which the same relief was obtained in respect of a lease. I would also refer with approval to Mr. Cyprian Williams' statement of the law in Williams' Vendor and Purchaser, 2nd ed., vol. i., p. 783: see also the statement of the law on this subject in Story's Equity Jurisprudence, paras. 155–159. *May* v. *Platt* (4) is not a very satisfactory authority. The point was dealt with on an application to admit evidence; the judge therefore did not have the opportunity of knowing in what precise particular there was a mutual mistake or how the mistake arose, nor was the question thoroughly argued; neither *Hanley* v. *Pearson* (2) nor *Cowen* v. *Truefitt* (3) nor *Olley* v. *Fisher* (5) was cited, nor was any reference made to the discussion of the question in the second edition of Fry on Specific Performance.

On this point I agree with P. O. Lawrence J., that if such relief were necessary the plaintiffs' conveyance could be rectified so as to bring it into conformity with the actual bargain in each case. It seems to me that, on principle, if an instrument of whatever nature is rectified it ought to be treated as if the necessary alteration had actually been made with the pen and had been part of the document at the date of its completion.

On the whole I agree with the judgment of P. O. Lawrence J. and am of opinion that this appeal fails and should be dismissed.

YOUNGER L.J. The facts of this difficult case have been very fully and carefully stated by the learned judge. I will

(1) [1901] 1 Ch. 28.
(2) (1879) 13 Ch. D. 545.
(3) [1899] 2 Ch. 309.
(4) [1900] 1 Ch. 616.
(5) 34 Ch. D. 367.

accordingly, if I may, confine myself in any statement I make of them to certain aspects of these facts, not referred to by him, which have a distinct bearing on a very fundamental problem in the case never, it would seem, very fully explored in the Court below—I mean the state of mind, in relation to these two sales, of the vendors themselves—not of one of their agents or another, but of themselves. After all, they were the parties to the agreements and conveyances: it is their state of mind which matters in this dispute. Yet they were neither of them called as witnesses. A possible explanation of the absence of both from the box may perhaps be gathered from the evidence of their solicitor Mr. Stirk. It may be that they were not prepared to support, on this question of common mistake, the case of the plaintiffs. But whether this was so, or not, the fact remains that they were not called and their position in reference to this question must be ascertained, so far as it is possible to ascertain it, by their statements and actions as disclosed in the evidence that was adduced. It seemed to me after the hearing before us to be not unlikely that, if the relevant facts in the case were marshalled from that point of view, it would be found that the personal position of the vendors in this matter was, at the very highest, left in a condition of complete uncertainty—as serious a result for the plaintiffs as if it were affirmatively established that in relation to the two formal contracts with the conveyances following thereon which they executed, the vendors were under no common mistake at all.

Accordingly I have thought it right to inquire into their state of mind with reference to this important matter. That they laboured under some mistake is not in doubt, but it has I think been assumed rather than established that their mistake was the same as the plaintiffs', that is, that both vendors and plaintiffs laboured under a common mistake. I propose accordingly to examine the facts with a view of ascertaining whether this assumption is correct. [The Lord Justice then reviewed the evidence at length with special reference to the state of mind of the vendors as indicated by

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their actions, statements and conduct so far as thereby disclosed, and after stating that the learned judge's finding to the effect that the vendors themselves intended to include the brown land in the plaintiffs' agreement and conveyance was by him rested exclusively on the letter sent by the vendor Mr. Hinckes to the auctioneer on the morning of the sale, proceeded as follows :] I do not know whether the learned judge might have modified that finding had there been present to his mind in relation to this part of the case any of the history and circumstances which I have been reviewing. But that review, coupled with the action of the vendors at every subsequent stage, leads me at least to the conclusion that while they too were under some misapprehension their mistake was not the same as the mistake of the plaintiffs. For my own part I feel reasonably satisfied on a review of all the facts that, under the description of the yard for which he and his wife were receiving 6*s.* a week, Mr. Hinckes' intention was to include only what was comprised in the deed of 1885—the deed whose envelope Mr. Stirk had marked " Yard " in Mrs. Hinckes' presence—his belief being that that included the whole of the yard for which they were receiving 6*s.* This was the vendors' only mistake, and it is because it was that and no other that the vendors against whose honour no word has been said have never at any time, directly or indirectly, suggested, so far as I can see, that the defendant received under his agreement and conveyance a yard more than at the time they intended him to have. The last thing they had it then in their minds to do—such is my inference from the whole of the circumstances so far as we have been permitted to know them—was, without, be it noted, any professional advice or assistance, to interfere in their " lotting " with the division of the property made by the deeds themselves. The whole trouble has been due to the fact that the auctioneer who knew nothing of the deeds did know about the yard ; the vendors knew of the deeds, but were either ignorant, confused or forgetful as to the real relation in which the yard as then occupied stood to them.

To my mind, no other explanation will square with or account for their conduct in this matter from first to last or will account for their assertion, never so far as I can see withdrawn, that what the plaintiffs were to have was the 332 square yards, and that these they have got. In those circumstances, if the mistake of the plaintiffs is to be imputed to the vendors personally as a common mistake it was, as it seems to me, essential that the vendors, or at all events one of them, e.g. Mr. Hinckes, should have been called, to say that he shared it. If he had been so brave the review of the facts here given makes it clear how difficult it would have been for him, a fiduciary vendor too, to make that statement convincing. He would have had to say of course that it had been his deliberate intention to sell the yard as it stood for 200*l.* Now the brown is about a third of the whole. Its proportion of the 200*l.* is therefore about 66*l.* If he were then asked whether for the sake of that 66*l.* he had without advice risked being left with a house on his hands valued at 700*l.* and deprived permanently of any garden ground: or if he were asked whether he had not put a fantastic reserve of 700*l.* on this house with only a backyard—the auctioneer thought so—while at the same time offering all the land for 200*l.*: or whether for the sake of such a sum as 66*l.* or if you like 100*l.*—for doubtless the sum would not have been worked out in his mind arithmetically—he had deliberately imposed this permanent handicap upon the house whose value in his eyes was relatively so much higher than the land, what could he have said in answer? In my view he could have said nothing intelligent. And there are many other questions of the same sort that come readily to the mind. Is it then surprising that Mr. Hinckes did not come forward to say that he and his wife ever or always intended to sell to the plaintiffs for 200*l.* the whole of the yard leaving the house with no useful ground attached to it? Surely not; and all the more when this also is remembered that, although by their indemnity arrangements with the plaintiffs the vendors have been relieved of all pecuniary risk resulting from any claim upon them by the defendant, nevertheless neither their

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solicitor nor they would make or have made either in the witness box or out of it that avowal of this common mistake which the learned judge has found that they shared with the plaintiffs.

But it is not necessary for the purpose of any conclusion on this part of the case that my own view as to the vendors' state of mind should even probably be correct. It is enough if it is reasonably possible. The evidence by which it is sought to show that words taken down in writing are contrary to the concurrent intention of all parties to the instrument must be of the highest nature; it must be "irrefragable." This dates from the time of Lord Thurlow, and Lord Eldon quoting him with approval in *Marquis of Townshend* v. *Stangroom* (1) proceeds: "He therefore seems to say, that the proof must satisfy the Court, what was the concurrent intention of all parties; and it must never be forgot, to what extent the defendant, one of the parties, admits or denies the intention." I need not multiply authorities on this point. The rule, I think, is not open to question, and applying it here I reach the conclusion that the plaintiffs have failed *in limine*; they have not even begun to move in their action. They have only shown that their remedy was rescission or nothing, and that that, their only remedy, they deliberately renounced. To avoid misunderstanding I desire to add here that in considering the position of the vendors personally I have passed the stage of any intention attributable to the auctioneer. We have been considering a case of rectification not of rescission. In such a case what must be established is that there has been a mistake in drawing up the formal document common at its date to the parties to that instrument.

Now, as I have said, the case of the plaintiffs as I see it was rescission or nothing. In saying so, however, I ought not to forget that the plaintiffs do contend that in fact they need not rely on mutual mistake at all, for that the formal agreement for sale to them of July 29 includes on its true construction both the pink and the brown. And the learne

(1) 6 Ves. 334.

judge, although with some hesitation, has so held. I cannot myself take that view of the agreement. It is to my mind an agreement for the sale of land measured by metes and bounds with a frontage of six yards and a total area of 332 square yards or thereabouts. The title to the lands sold is expressed to commence with the indenture of December 23, 1885, and a reference to that indenture shows the identical measurement previously mentioned. Moreover it is on this footing in no way untrue to say, as the agreement does say, that these premises "are now in the occupation of Mr. Greenstone." They were. It is, therefore, not, to my mind, open, on construction of this agreement, to say that because a further parcel of land of 189 square yards belonging to the vendors was also in the occupation of Mr. Greenstone that that area is to be included under the words "or thereabouts" the more especially when the indenture of December 23, 1885, has no connection with the 189 square yards, so that if they were included in the agreement they would be there under an open contract. In my judgment the actual intention of the draftsman of this agreement has been as completely given effect to by the words used in it as it is carried out by the conveyance which followed it. Under the agreement as under the conveyance it is to my mind quite clear that the plaintiffs have the pink and the pink only. And I would here observe that the learned judge utilised the decision of *Leuty* v. *Hillas* (1) merely for the purpose of assisting a decision in favour of the plaintiffs on the footing that the agreement of July 29 actually comprised the brown land. It was not supposed by the learned judge nor was it contended by Mr. Jenkins before us that that case assisted him on any other hypothesis. My own view is the same. But I will return to this matter at a later stage.

Mr. Jenkins' case before us, failing his case on construction, was that on the learned judge's findings of common mistake he was entitled to have his conveyance rectified and thereupon obtain an order against the defendant for a conveyance to the plaintiffs of the brown land which as against them he

(1) 2 De G. & J. 110.

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was not, so it was contended, entitled to retain. Mr. Jenkins was quite express that until he had his own contract and conveyance reformed he had no rights against the defendant. Here too I agree with him. Accordingly I will now assume that I am wrong in the views I have expressed on the question of mistake, and I will proceed to inquire whether rectification of the plaintiffs' agreement and conveyance, even on the footing of mutual mistake, is possible. And we are at once confronted with questions of extreme difficulty. There can I think be little doubt—however the relief is phrased—that here we have in substance an attempt by the plaintiffs to obtain what in effect is specific performance of a written agreement with a parol variation. It is impossible to read Lord St. Leonards' judgment in *Davies* v. *Fitton* (1) with his concluding statement that it is so clear the Court can make no such decree "that it is really against first principles to discuss it," without feeling how great must be the responsibility of any tribunal if it determines that the Court can now make such an order. And Lord St. Leonards' judgment is all the more emphatic when it is compared with his judgment in *Mortimer* v. *Shortall* (2) delivered only eight days afterwards, in which the Lord Chancellor did rectify because the prior agreement was not in writing. And then there is Farwell J.'s judgment in *May* v. *Platt* (3) in which he applied *Davies* v. *Fitton* (1) without doubt or hesitation. It is true that *Olley* v. *Fisher* (4) was not cited to Farwell J., but the retort is open that *Davies* v. *Fitton* (1) with all the authority of Lord St. Leonards was not in that case cited to North J. I am of course conscious of the criticisms which have been made upon this principle. I have little doubt that it originated—in the reluctance—shall we say ?—of the Court of Chancery, when exercising its jurisdiction either to rectify or specifically enforce contracts, to run counter to any positive rule of law relating to written instruments. I am not sure that there was not good sense in that reluctance, but be that as it may the rule is old and apart from recent criticism is well established,

(1) 2 D. & War. 225.
(2) (1842) 2 D. & War. 363.
(3) [1900] 1 Ch. 616.
(4) 34 Ch. D. 367.

and I think myself that the safer course to take with reference to it is that adopted by Neville J. in *Thompson* v. *Hickman* (1) —namely, to observe the rule and leave its validity to be decided finally by the House of Lords. To my mind this is one of those rules which, if they are binding at all, are as binding on the Court of Appeal as on the Chancery Division, and it may more safely be left to the highest tribunal to release us all from this rule if to that tribunal it seems that the rule ought not to remain operative. And I am the more inclined to suggest this course, because the authorities before the Judicature Act being almost admittedly preponderant in favour of the rule I find it hard even to understand how that Act can have made any difference with respect to it. For while the Judicature Act may enable you to do in one action what before the Act had to be done in two, I have difficulty in seeing how it enables you to do in one action something that before the Act you could not do at all. I do not doubt that I must be mistaken in this view, the contrary being so authoritatively asserted. But although I have searched I can find no explanation which satisfies my mind of the change that Act is supposed to have effected. For myself therefore I would prefer to leave these cases to be dealt with by the House of Lords, I hope in some other action, and say that we are bound by authority to hold that rectification cannot here be entertained.

But I am prepared in this case to come to the same conclusion, on what seems to me a more certain ground, and that is that you can have no specific performance with a parol variation if thereby the Statute of Frauds would be infringed. In *Olley* v. *Fisher* (2) North J., following Fry on Specific Performance, in holding that the Court could reform a contract and direct a specific performance of the reformed contract, added that it would do so, in every case in which the Statute of Frauds does not create a bar. I know that a very limited construction has been placed upon that reservation. I doubt for many reasons whether any limitation is permissible; I doubt it specially because, on principle,

(1) [1907] 1 Ch. 550. (2) 34 Ch. D. 367.

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it seems to me to be necessary, if the statute is not pro tanto to be repealed altogether, that no defendant shall be required to convey land to a plaintiff under agreement unless there is a signed note or memorandum of that agreement forthcoming or unless the statute on the ground of part performance or by reason of countervailing fraud or otherwise is inapplicable. And I am glad to find that the application of the statute to such a case as this was recognized as long ago as 1691 in *Cass* v. *Waterhouse*. (1) In that case there was a question whether I. S. had or had not agreed to convey five houses in mortgage and not three only to A. Upon a bill brought by A. to have the houses conveyed: "Though the Court seemed satisfied that I. S. had covenanted to convey all five to A. and though she had so done, yet there being no agreement in writing as to the two houses not comprised in the conveyance, the Statute of Frauds and Perjuries stood so full in the way that they could not decree the conveyance of them." And I have found also in the American Reports a most admirable discussion of the whole subject, and in the same sense, in *Glass* v. *Hulbert*, (2) a case of which Story's editor says (11th Ed. vol. i., p. 162), "The authorities were extensively considered, and it was held that equity would not reform a deed of land on oral evidence so as to make it embrace other land alleged to have been omitted by mistake, unless by part performance or otherwise the defendant were estopped to set up the statute." I have read the case; it is full of learning; it bears out entirely what Story says of it, discussing incidentally the doctrine of part performance with a fullness which is very useful also in the present case. I will cite two passages only from the judgment (3): "Rectification by making the contract include obligations or subject matter, to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there were no writing at all." This proposition is supported by reference to American authorities. The judgment goes on: "Such rectification, when the

(1) (1691) Prec. in Ch. 29; 2 Eq. Cas. Abr. 687.

(2) (1869) 102 Mass. 24.

(3) 102 Mass. 35.

enlarged operation includes that which is within the statute of frauds, must be accomplished, if at all, under the other head of equity jurisdiction; namely, fraud." And for that a series of English authorities are cited. I cannot myself see the answer to these propositions, and I should desire also if I may to adopt as part of my judgment a most lucid statement of the position to the same effect contained in Ashburner's Principles of Equity, p. 382. I may add I have found no case in which in England any order to the contrary of these statements has been made.

But then two answers are brought forward in the present case. The first somewhat tentatively is that the statute is not pleaded. To that the reply I think clearly is that no allegation is made in the statement of claim which would suggest the statute as a defence. I find that Vice-Chancellor Bacon, in one of the cases which I have consulted for the purpose of this judgment, remarked that the Statute of Frauds had no more to do with the case before him than had Magna Charta: *In re Boulter.* (1) That strikes me as being the position of this statement of claim. Moreover, the question of the statute was discussed in the Court below and is dealt with by the learned judge in his judgment. In these circumstances an amendment raising the plea of the statute would be a matter of course.

The second answer, and this has been accepted by the learned judge, is that there has here been part performance sufficient to take the case out of the statute. But I suggest very respectfully that that is not so. It is said the plaintiffs have taken possession of the brown. But they have taken such possession against the defendant, to whom it was conveyed on September 3, 1920; they were not given possession of it by the vendors. Their position on this point might have been different if, as the plaintiffs tried to prove, they had expended money on the brown or otherwise altered their position on the faith of the verbal agreement. But they failed to prove that case, and in my view as against the defendant here no kind of part performance is shown on

(1) (1876) 4 Ch. D. 241, 245.

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their part sufficient to take the case out of the statute. I am of opinion, therefore, that rectification of the plaintiffs' agreement and conveyance is impossible even if mutual mistake be admitted or established.

But, if again, I be wrong in this, then the question still remains whether even after rectification the plaintiffs would have any rights whatever as against the defendant. Now, here, the first observation I desire to make is that there is, as I think, no case at all for rectification at the instance of the vendors of the *defendant's* contract or conveyance. I do not for this purpose need to rely upon any view I may hold as to the vendors' intentions in relation to the defendant's contract. I will assume contrary to my own view, that they have not thereby been given effect to. Even so there is no room for rectification. For the defendant's contract was not preceded by any agreement of any kind with reference to which, even if it were otherwise permissible, rectification could be directed. In other words and apart from every technicality there is no case for rectification in that instance at all. Nor indeed did Mr. Jenkins contend that there was. He admitted freely that there was not. The plaintiffs he said must obtain a conveyance from the defendant by the strength of their own right and not by means of any assistance from the vendors. But how, it may be asked? The learned judge has so decreed, but he has not supplied the explanation. Neither so far as I could appreciate their arguments did the respondents. The answer is not easy to find. I begin by observing that no kind of fraud is alleged against the defendant. Any such imputation was expressly disclaimed. I observe next that nothing that happened at the auction is alleged to give the plaintiffs any rights as against the defendant. It is not even alleged in the statement of claim that Thomas, to say nothing of the defendant, was present at the auction. Where then is there any kind of right in the plaintiffs as against the defendant other than a right which on rectification of their own conveyance they could set up as in the shoes, so to speak, of the vendors? I can myself see none in the plaintiffs themselves, and the vendors,

as I have shown, have none. If there is any right at all it must be by some extension of a principle said to be embodied in *Leuty* v. *Hillas*. (1) But is there any principle in that case that can be so extended? I can myself find none. The basis of Lord Cranworth's judgment, if it is looked for, is really very simple. It will be noticed that the proceedings at the auction in that case, so much discussed in the argument, are not once even mentioned in the judgment. The judgment is based exclusively on the terms of the actual contracts as executed by the plaintiff purchaser of Lot 5 and the defendant purchaser of Lot 6. The whole pith of the judgment is, I think, clearly in these words: "Mr. Hillas then entered into a contract for the purchase of lot 6, not including the disputed parcel. He might think that his contract included it, but he had no right to think so, for the contract, according to its fair construction, extended to nothing but what was in the occupation of Mrs. Trulock. Having then by his assignment obtained more than what was included in his contract, he became merely a trustee of the excess, and the Plaintiff is entitled to a decree against him." That is to say, the defendant had obtained an assignment capable of being rectified in accordance with the prior written contract. The benefit of that rectification had passed to the plaintiff, the purchaser of Lot 5 by his contract with the vendor. The assignment therefore by the defendant was ordered to go to the plaintiff direct. There is no refined equity here; no application of the doctrine of notice or anything of that kind. The case ceases to be applicable to this case so soon as it is ascertained that the defendant's contract and conveyance here are, as they are, unassailable, to say nothing of the fact that the plaintiffs' contract and conveyance are in all respects as executed consistent with the complete correctness of the defendant's. And such was apparently the view of the learned judge as it was certainly the view of Mr. Jenkins in his argument before us. But even if there were any such refined equity involved in *Leuty* v. *Hillas* (2) resulting from the proceedings at the auction there

(1) 2 De G. & J. 110, 122. (2) 2 De G. & J. 110.

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it would in my judgment be quite inapplicable to any such proceedings as characterised the auction in this case. Compare the precision of the particulars there with the happy go lucky proceedings on the present occasion. I have already referred to them. I need not do so again. If they were to be made the foundation of any claim they should most certainly have been pleaded. They are not. Apart from this, of itself I think fatal, I cannot myself as a result of them find any kind of equity binding the conscience of the defendant towards the plaintiffs even on the footing that the plaintiffs have established their right to rectify their own conveyance as against the vendors. I could not myself in case of dispute conclude anything from the confused proceedings at this auction with the auctioneer bidding vigorously for a lot the contents of which he himself thoroughly understood but which he had only vaguely described to the others present. I should not myself venture to vouch such proceedings as effective in case of dispute to bind anybody to anything or to notify anything to anybody. The only reason why, as I see it, the plaintiffs in relation to this auction stand on firmer ground than could anybody else is that the auctioneer was bidding for them and as between, and only as between, that gentleman and himself was there no room for misunderstanding.

The truth is I think that the plaintiffs' difficulty, such as it is, results from their own carelessness and from nothing else. I have not hitherto said a word about them or about the extraordinary want of method and absence of consultation in respect of this purchase both between the two Messrs. Craddock on the one hand and between their company and its solicitors on the other. Every one of these people knew something; no one of them knew everything, and yet apparently they never conferred. The result is miscarriage, the consequences of which with the assistance of acquiescence, though not of support, on the part of the vendors, purchased by a complete indemnity, the plaintiffs are seeking in these proceedings to throw on to the defendant. In my judgment this is mistaken action on their part. The defendant has

done them no wrong. If the auctioneer's estimated rental value of the house he purchased is in any way correct he has paid a more than full price for all that his conveyance gives him. The plaintiffs by the same standard have paid little if anything too much for what they have got. But in respect of that they might have got rid of their purchase. They had a remedy in rescission against their vendors which they did not think fit to pursue. Whether however they had pursued that remedy or not, they should, in my judgment, have left the defendant alone. As I see this case, it is enough to defeat the plain iffs' claim against him that they should fail at any one point. My opinion is, I express it with unfeigned respect and deference for all contrary views, that the plaintiffs fail at all points and I would be for dismissing their action and allowing this appeal.

Appeal dismissed.

Solicitors for appellant: *Wainwright & Co., for E. L. Feibusch, Wolverhampton.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Fowler, Langley & Wright, Wolverhampton.*

G. A. S.

EVE J.
1923
April 10;
May 1.

In re TAYLOR'S DRUG COMPANY, LIMITED'S, APPLICATION.

[1922. T. 1808.]

Trade Mark—Registration—"Germocea"—Compound of existing registered Marks "Germolene" and "Homocea"—Risk of Confusion—Registration refused—Trade Marks Acts, 1905–1919.

Applicants sought to register a trade mark which was a compound of parts of two existing marks already on the Register in respect of preparations of the same character as those sold by the objectors. The proprietors of one of these marks opposed the registration. No confusion had arisen between similar preparations sold in the same shops under the two registered marks:—

Held, confirming the registrar's refusal to proceed, that the Court would decline to register the compound word on the ground that it might bridge over the distinction between the two registered marks and create confusion between the goods offered for sale under each of the three.

THIS was a motion by way of an appeal by the Taylor's Drug Company, Ld., from the refusal by the registrar to proceed with the registration of the word "Germocea" in classes 3 and 48, on the ground that it was calculated to cause confusion and to deceive. The applicants were manufacturing chemists in Leeds and the proprietors of some 100 shops. The application was opposed by Lady Mary Veno and Veno Drug Company, Ld., on the ground that it so nearly resembled their trade mark "Germolene" which had been registered in the same classes in respect of a medicated skin ointment and medicated soap, and because their mark had become distinctive of the goods for which it was sought to register "Germocea." The owners of "Homocea," another mark which had been on the Register for some years in respect of similar preparations, had not in fact opposed the registration, but a declaration by their secretary had been filed by the present opponents to the effect that confusion might occur between the two marks, and that the proprietors of "Homocea" would have opposed the registration of "Germocea" had they known of the application. The registrar did not think that the appellants' mark resembled

"Germolene" so nearly as to be calculated to deceive, yet, having regard to the word "Homocea" being already on the Register, he thought there would be a risk of confusion, and he refused the registration of the mark.

Hunter Gray K.C. and *Sebastian* for the applicants. The registrar in this case has not exercised his discretion properly by refusing the registration. He has in fact found that there would be no confusion between "Germocea" and "Germolene," which is the real question to be decided, but he has taken into consideration the existence of another word on the Register—namely, "Homocea"—the owners of which are not opponents here—and has held that there would be a likelihood of confusion between the three marks. It is a novel point, and the Court can, in its discretion, overrule the registrar's decision.

Sir Duncan Kerly K.C. and *R. Moritz* for the opposers, Lady Mary Veno and The Veno Drug Company Ld. This is a clear case. Sect. 19 of the Trade Marks Act, 1905 (5 Edw. 7, c. 15) applies, and the registrar is entitled to consider whether the proposed new mark so nearly resembles a trade mark already on the Register as to be calculated to deceive. We submit that this mark can reasonably be confused in the mind of the public with the marks already registered. The onus is on the applicants to prove that there is no reasonable risk of confusion: *In re United Kingdom Tobacco Co.'s Application.* (1) There would be this risk, we submit, if "Germolene" only was in question, but the presence on the Register of "Homocea," which is well known in the trade, increases the strength of our case. Even if each of these marks might not be confused with "Germocea" yet this compound word may bridge over the distinction between these two other registered marks and lead to confusion as to the goods offered for sale under all three marks. The registrar was justified in refusing to register this new mark and his discretion will not, we submit, be overruled.

Hunter Gray K.C. in reply.

Cur. adv. vult.

(1) (1912) 29 R. P. C. 489.

EVE J. 1923

TAYLOR'S DRUG CO.'S APPLICATION, *In re.*

May 1. EVE J. This is a motion by way of appeal by Taylor's Drug Company Ld. from the refusal by the registrar to proceed with the registration of the word "Germocea" in classes 3 and 48, on the ground that it is calculated to cause confusion and to deceive. Registration is opposed by the owners of the registered mark "Germolene," and is objected to by the owners of the registered mark "Homocea."

The word "Germocea" had not been used for any goods offered for sale prior to the application, but it is intended for use in connection with preparations of the same character and to be used for the same purposes as those sold by the objectors under their respective marks. It is an obvious compound of parts of the two existing marks.

The opponents have proved the expenditure of a very large sum in advertising their mark, and steadily progressive gross receipts for the preparations sold thereunder amounting to several thousands of pounds per month. "Homocea" has been registered and largely used for many years past.

It is to be noted that no confusion has been found to arise between similar preparations sold in the same shops under the two marks "Germolene" and "Homocea." The question for consideration here is whether the same immunity from confusion, the same distinctiveness, will be maintained in the case of like commodities marketed under the word "Germocea," or whether, as has been well put on behalf of the respondents, the compound word may not bridge over the distinction between the two registered marks and create confusion between the goods offered for sale under each of the three.

The learned registrar, while not prepared to hold that the applicant's mark so nearly resembles "Germolene" as to cause confusion or to be calculated to deceive, has refused to proceed on the ground that the presence of "Homocea" on the Register is a factor which introduces a risk of confusion sufficient in the circumstances to justify his refusal to proceed. I agree with him, and think the appeal fails and must be dismissed with costs.

Solicitors: *Timbrell & Deighton; Hedley Norris & Co., for Vaudrey, Osborne & Mellor, Manchester.*

G. M.

LONG *v.* GOWLETT.

SARGANT J.

[1921. L. 2012.]

1923

Feb. 14, 15, 16, 21, 22; *March* 28.

Easement—Right to go on Land of Another to clear a Millstream and repair the Banks—Estoppel by Record—Extent of Estoppel—Common Owner—Severance—Conveyance—General Words—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-s.* 2.

Estoppel by record operates as an estoppel in respect of the whole right claimed and not merely in respect of the particular relief unsuccessfully asked for.

The owner of a water-mill brought an action to restrain the riparian owner of land higher up the river from obstructing his access to that land along the north bank of the river for the purposes of repairing the bank and cutting weeds, and based his claim to relief on the allegation in his statement of claim that he had a prescriptive right to an easement to pass along both banks of the river for these purposes. The action was dismissed :—

Held, that his failure in that action operated as an estoppel to prevent his setting up in subsequent proceedings brought by the riparian owner's successor in title a prescriptive right to pass along either bank for these purposes.

Badar Bee v. *Habib Merican Noordin* [1909] A. C. 615 applied.

Where land in common ownership is sold contemporaneously in lots to two purchasers a right for one purchaser to go on the land of the other to clear a millstream and repair its banks (there being no visible path or other sign of such user) will not pass by virtue of the words implied in the conveyance to him under s. 6, sub-s. 2, of the Conveyancing Act, 1881, unless there has been before the severance of ownership a de facto enjoyment of the right, however precarious, by the occupier of that part of the land altogether apart from the ownership or occupation of the other part.

Broomfield v. *Williams* [1897] 1 Ch. 602 distinguished.

THE following statement of the facts is substantially taken from the judgment :—

The plaintiff was the riparian owner of both sides of the River Granta at Linton, Cambridgeshire, and the defendant was the owner of the land on both sides of the river immediately below the plaintiff's land and of an ancient water-mill called Hadstock Mill standing on part of that land. Their title to the land arose as follows :—

By an indenture of conveyance dated October 11, 1845, John Kidman conveyed to one John Reeve the mill at Linton and its surrounding land or curtilage and certain adjoining

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land. In that conveyance the mill and its surroundings are described in the following terms—namely: "All that the dwelling-house mill house Water Grist Mill Great Mill Breast Mill and Over Shot Mill commonly called or known by the name of Hadstock Mill or Mills together with all the outhouses buildings yards orchards and gardens thereunto belonging. And all the streams waters banks sluices drains bridges overshotts dams watergates waterways backwaters and all and singular the timber cells waterwheels stones going gears utensils and materials for grinding and fixtures being the property of the said John Kidman (party hereto) in upon and belonging to the said Mill and Millhouse And also all that land meadow and pasture ground to the said Mill and Millhouse belonging and known as parcel thereof containing by estimation one acre be the same more or less together with the full and free liberty of the stream water watercourse and river there running and over which the said Mill stands as the same is now or has been used and occupied with the said Mill which said hereditaments and premises situate and being in the Parishes of Hadstock and Linton aforesaid or one of them are now in the occupation of the said John Reeve." This conveyance also included an assurance of higher riparian land (which was then copyhold) of John Kidman on the South bank above the mill grounds. This land, either alone or together with land already belonging to John Reeve by allotment, seems to have brought his riparian ownership up to the Pembroke College boundary on that bank. Both the mill and its curtilage and the higher riparian land assured by this indenture are mentioned herein as being at the time in the occupation of John Reeve.

The said John Reeve died in the year 1883, and by an indenture of conveyance dated January 31, 1884, the devisees in trust of his will assured (amongst other hereditaments) Hadstock Mill and other the lands and hereditaments comprised in the conveyance of October 11, 1845, to a purchaser Frederick Searle Nichols. Under this conveyance, which carries a plan, the purchaser became entitled to the whole of the land on the south bank of the River Granta from

Hadstock Mill up to the Pembroke College boundary. So far as regards Hadstock Mill and other the hereditaments comprised in the conveyance of October 11, 1845, the parcels in the conveyance of January 31, 1884, are substantially identical with those in the conveyance of October 11, 1845.

By an indenture of conveyance dated January 14, 1891, the devisees under the will of John Kidman (who had died in the year 1847) conveyed the land on the north bank of the river from the mill curtilage up to the Pembroke College boundary to one Johann Gotlieb Brinckmann, who proceeded to build a house thereon and to form a pleasure garden and orchard along the north bank of the river. The exact terms of this conveyance are immaterial. It does not contain any reservation or exception in favour of the grantees under the previous conveyance of the land on the south bank—that is, the conveyance of October 11, 1845.

Mr. F. S. Nichols died in the year 1906, having devised all his property to his widow. Mrs. Nichols continued the working of the mill for a short interval; but in the month of October, 1908, she put up for sale by auction in lots the property conveyed to him by the indenture of conveyance of January 31, 1884. At this auction Lot 1 comprised Hadstock Mill with its curtilage, including the land on the north bank up to that conveyed to Brinckmann by the conveyance of 1891 and the land on the south bank up to a fence opposite the lower or west boundary of the land so conveyed to Brinckmann; and this lot was purchased by the defendant Gowlett. Lot 2 comprised the whole of Nichol's land on the south bank of the river from the fence just mentioned up to the boundary of the Pembroke College land; and this lot was purchased by Brinckmann, so that he became entitled to the land on both sides of this length of the river.

The actual conveyances of Lot 1 to the defendant and of Lot 2 to Brinckmann were deferred until an enfranchisement of them, or of part of them, had been effected, and until a dispute between the purchasers as to the true boundary between the two lots, particularly on the south side of the river, had been adjusted by the execution of an agreement

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dated September 7, 1909, and made between the defendant of the one part and Brinckmann of the other part. But ultimately Lot 1 was conveyed to the defendant by an indenture of September 7, 1909; and Lot 2 was conveyed to Brinckmann by an indenture of September 14, 1909. It is clear, and was admitted on behalf of the defendant, that in all the circumstances of the case, and particularly having regard to the purchases having been made at the same auction, these two conveyances must be treated as simultaneous, and that no advantage can be claimed by the defendant through his conveyance having actually been executed a week earlier than Brinckmann's. In fact, however, the hereditaments conveyed to the defendant were described in much the same terms as those in which they had previously been described, and included as before "the full and free liberty of the stream watercourse water and river there running and over which the said mill stands as the same is now or has been used and occupied with the said mill."

On May 10, 1911, the defendant began an action [1911. G. 832] against Brinckmann in the Chancery Division. By his statement of claim in that action he based his claim on the following allegations, amongst others. This is para. 2: "On the plaintiff's said land and abutting on the said river is an ancient water mill known as Linton Mill otherwise Hadstock Mill now and for several years past in the occupation of the plaintiff. For many and in particular for more than 40 years last past the said Mill and the owners and occupiers thereof have enjoyed as of right the free and uninterrupted passage and flow of water in the said river to the said Mill for the purpose of working the same and the plaintiff is entitled by prescription or in the alternative by virtue of a lost grant to have the flow of water in the said river to the said Mill in its ancient and accustomed quantity unimpeded by weeds or other obstructions and undiminished by leakage or percolation and for the purpose of working the said Mill in its ancient and accustomed manner." Then para. 3: "The defendant is and has at all material times been the occupier of the lands adjoining the plaintiff's said

land and on both sides of the said river and higher up upon the course thereof than the plaintiff's said land on both sides of the river." Then para. 4: "The plaintiff and his predecessors in title have been for many and in particular for 40 years and upwards entitled to an easement or right to pass and repass along the banks of the said river on both sides thereof above the plaintiff's said land with or without workmen and servants and with or without barrows and tools and piles clay or other materials for the purposes of inspecting and repairing the said banks and cutting the weeds in the said river and other purposes of a like nature." Then para. 5 is: "The defendant has by means of a fixed iron railing placed across the north bank of the said river and by planting shrubs and bushes in divers places along the north bank of the said river obstructed the access of the plaintiff his workmen and servants to and along the said bank for any purpose whatever and has obstructed or prevented the plaintiff from enjoying the said easement aforesaid over such bank and has trespassed upon the plaintiff's said right or easement." And the defendant claimed in that action, amongst other things, an injunction to prevent Brinckmann from interfering with the defendant's right of access to the said north bank. By his defence in that action Brinckmann pleaded amongst other things as follows—namely, by para. 4 he said: "The defendant denies that the plaintiff or his predecessors in title has or have been for many or for 40 years or upwards or in fact entitled to any easement or right to pass along the banks of the said river on both sides or either side thereof above the plaintiff's land whether with or without workmen or servants or with or without barrows or tools or piles clay or other materials for the purposes of inspecting or repairing the said banks or either of them or cutting the weeds in the said river or for any other purpose or purposes of a like or any nature"; and by para. 5, after stating that he had before action offered to give the present defendant access to the north bank of the river by a certain roadway (which the defendant had refused) and that he, Brinckmann, was willing before action brought to allow the defendant to have access along the

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south bank for the purpose of repairing it, he denied that the defendant was entitled to any such right or easement as alleged in para. 5 of the statement of claim ; or that he, Brinckmann, had trespassed on any such right or easement. The defence admitted by silence the statements in the claim as to the actual obstruction of the access claimed to and along the north bank.

In that state of the record the action came on to be heard before the late Neville J., with the result that on November 21, 1911, judgment was given dismissing the action with costs.

Mr. Brinckmann died on December 19, 1917, and by an indenture of conveyance dated July 3, 1918, his executors and trustees conveyed to the present plaintiff in fee simple the lands on the north and south banks of the river which had been acquired by the deceased as aforesaid. It is common ground in the present proceedings that the plaintiff is, as regards these lands, the successor in title and privy of Brinckmann.

The trouble between the plaintiff and the defendant began in the month of July, 1920. On the 13th of that month the plaintiff wrote the following letter to the defendant : " Dear Mr. Gowlett, I am sorry I must complain of the continued passing of your boats through my garden last Sunday. I have raised no objection so far as to your passing through occasionally, although I rather expected you would have mentioned it to me first. I have no wish to be arbitrary over the use of my part of the river, but should you wish for the use of it at any time, I shall be glad if you will first ascertain if it is convenient to me. I have always regarded your garden as private and I feel sure you will understand that I wish mine to be private also." To this moderate and temperate letter the defendant replied in the following highly aggressive and discourteous terms : " Dear Mr. Long, I shall not be at Linton for almost a fortnight or would call to see you regarding your letter of yesterday. The ownership of Linton"—that is, the mill—"entitles me to free and full use of the river, whereas your privilege does not extend beyond your boundaries, so you are quite right to regard my place as

private. I should be sorry to cause you annoyance in any way, but your suggestion of my going up the river only 'when convenient to you' is equally annoying and impertinent. Please understand that I shall go up when I wish to, this is not discourteously stated." The claim made by this letter was obviously far too wide and quite unsustainable, and has not been insisted on in the present action. Attempts were then made to settle the question by mutual inspection of deeds, but these were unsuccessful, and on September 20, 1920, the defendant wrote another aggressive and unwarranted letter, complaining of an act by the plaintiff, which could not in any way affect the position or rights of the defendant. This letter and two succeeding letters are in the terms following. This is from the defendant to the plaintiff dated September 20, 1920: "Dear Sir, I am negotiating with an engineer as to means of getting utmost horse-power from the river at Linton and shall be glad if you will let me know whether there is any risk of bank-bursting or leakage by the backwater which you have recently cut; if there is no risk, I shall not trouble you to fill in that backwater. Please do not divert the stream in such a way (or any other) again, nor intercept the flow of the river, as question of horse-power is of greater importance to my business now than ever." The plaintiff answered that on September 22, 1920: "Dear Sir, Your letter of the 20th to hand. Nothing has been done to interfere with the flow of water to your Mill. I have a perfect right to clear a little mud from what you term a backwater, which is all that has been done and I should hardly have thought it necessary for you to write to me about this." Then the defendant answered on September 28, 1920: "Dear Sir, As your letter of 22nd is no answer to the question re the state of the river bank, I am willing to come, or send, to inspect latter. The riparian ownership gives access straight along the bank, but the late owner of your property preferred that I should send through his entrance gates whenever I wished to inspect the North bank of the river. Please let me know which way you prefer to be used."

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Ultimately, as the parties were unable to come to an agreement in the matter, the plaintiff in April, 1921, put timbers across the river between his banks, with the result of preventing the defendant from using the boat above that point; and the defendant removed this timber as being an obstruction to the general right which he claimed of using boats on the river. I say "general right," because the defendant had not then limited his claim as regards boats to the use of them for cutting weeds; and I should judge from the evidence that there would be no need to cut weeds at that time of the year, or indeed until considerably later. Some further negotiation ensued, but without result; and ultimately on July 6, 1921, the plaintiff issued his writ in this action.

By the statement of claim in this action the plaintiff stated his ownership within certain limits of both banks and the bed of the river as a natural and non-navigable stream or watercourse, and his consequential right to place a bridge across it between his banks, complained of the defendant's claim to pass and repass in a boat, of his removal of the bridge and of his cutting weeds in the bed and on the banks, and sought (1.) A declaration negativing the defendant's right to pass or repass in a boat, or otherwise, for any purpose whatsoever over such part or parts of the river as formed part of the plaintiff's land; (2.) an injunction to restrain the defendant from trespassing on the river and the adjacent banks; and (3.) damages for the trespasses already committed by the defendant.

By his defence the defendant, after setting up that the existing banks of the river were artificial embankments, proceeded (para. 2) to set up a right to the flow of water to his mill undiminished by weeds or obstruction and undiminished by leakage or percolation in precisely the same terms in which he had claimed the right in para. 2 of the statement of claim in the previous action. He then by the same paragraph claimed a right to pass and repass along the banks of the river to inspect and repair and cut weeds, in precisely the same terms in which he had claimed the right in para. 4 of the statement of claim in the previous

action; but added a claim to pass and repass in a boat for that purpose. By paras. 3 and 4 of his defence he founded the rights claimed on prescription, or, alternatively, on lost grant. And by para. 8 he denied that the acts complained of by the plaintiff were trespasses or unlawful; and claimed the right to repeat them. By a counterclaim the defendant repeated paras. 1 to 6 inclusive of his defence, and asked for a declaration of right corresponding with the assertion of right contained in para. 2 of his defence. The plaintiff, by his reply and defence to the counterclaim, after certain formal denials in paras. 1 and 2, proceeded by para. 3 to set up the common ownership by Nichols of the mill and the plaintiff's land on the south bank and the subsequent sale of both by auction as negativing any acquisition of rights by prescription; and also by paras. 4 and 5 pleaded by way of res judicata the judgment against the defendant in the former action. And thereupon the defendant, by para. 2 of his rejoinder, alleged that for many years previous to October 3, 1908, Mrs. Nichols or her predecessors in title, and during the period between October 3, 1908, and September 7, 1909, the defendant, respectively entered on the south side of the river now belonging to the plaintiff for the purpose of repairing the bank and cutting weeds; and stated the terms of the grant to the defendant in the indenture of conveyance of September 7, 1909, and claimed that either by virtue of the express terms of that conveyance or by virtue of the general words implied therein by s. 6, sub-s. 2, of the Conveyancing Act, 1881, the defendant had granted to him an easement in accordance with para. 1 of the counterclaim. The defendant also pleaded that in the former action he did not claim to pass and repass along both banks of the river, and that that action related only to a claim to pass along the north bank thereof, and that his claim under the indenture of September 7, 1909, was not in issue.

A. Grant K.C. and *J. G. Wood* for the plaintiff. The defendant is estopped from claiming the right to go on the plaintiff's land. He is making the same claim as he did in the action

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against the plaintiff's predecessor in title, Brinckmann, that was dismissed. The whole matter is res judicata: *Barrs* v. *Jackson* (1); *Humphries* v. *Humphries*. (2) The Court of Chancery can, in refusing an injunction, reserve to the plaintiff the right to take further action in the same matter: *Langmead* v. *Maple* (3); but that was not done in the action against Brinckmann: see also for other authority with regard to res judicata The Annual Practice, 1923, p. 2043. The whole of the rights now being claimed by the defendant were also claimed in the 1911 action. Having failed the defendant is estopped. Again the only easements which pass by implication are apparent and continuous easements or easements of necessity: Carson's Real Property Statutes, 2nd ed., p. 67, where it is pointed out "that upon a severance of tenements easements used from time to time only do not pass without appropriate language." So too in Gale on Easements, 7th ed., p. 96, it is laid down that: "The implication of the grant of an easement may arise in two ways: 1st, upon the severance of an heritage by its owner into two or more parts; 2ndly, by prescription. Upon the severance of an heritage a grant will be implied: 1st, of all those continuous and apparent easements which have in fact been used by the owner during the unity . . . .; and, 2ndly, of all those easements without which the enjoyment of the severed portions could not be had at all": compare also Gale on Easements, 9th ed., p. 109. This was the view of the law taken by Thesiger L.J. in *Wheeldon* v. *Burrows* (4): see also *Polden* v. *Bastard* (5) and *Watts* v. *Kelson*. (6) Even therefore if the estoppel applied only to the right claimed on the north bank of the river, the claim to an easement on the south bank cannot be supported. It is not continuous or apparent, for there is no path on this side of the river. Further, no easement of necessity is claimed. The question resolves itself then into one of the construction of the two deeds of September, 1909. The defendant claims

(1) (1842) 1 Y. & C. Ch. 585, 594.
(2) [1910] 2 K. B. 531.
(3) (1865) 18 C. B. (N. S.) 255.
(4) (1879) 12 Ch. D. 31, 51.
(5) (1865) L. R. 1 Q. B. 156.
(6) (1871) L. R. 6 Ch. 166, 173.

not only a right to go along the bank on to the plaintiff's land, but also the right to cut weed and repair the bank. There is nothing in the conveyance to the defendant giving him any such rights. Moreover the conveyances to the defendant and Brinckmann, the plaintiff's predecessor in title, were in respect of sales made at the same auction, and they must therefore be treated as made simultaneously. The particulars and conditions of sale contain no reservation of these covenants in favour of the defendant, and the common vendor could not afterwards grant additional rights to the defendant at the expense of Brinckmann. Lastly, the rights claimed do not pass under the general words of the Conveyancing Act, 1881, s. 6.

Greene K.C. and *Dighton Pollock* for the defendant. The action of 1911 related only to a claim to go up the north bank of the river for the purpose of repairing the bank or removing the weed. To that extent only it operates as an estoppel. It does not affect the prescriptive right now claimed to ascend the northern half of the river by boat, and leave is asked to amend the pleadings so as to claim this right also by virtue of the conveyance of 1845. Again there is no estoppel with regard to the claim to go up the south bank for these purposes, especially as it is now sought to establish it by grant under the conveyance of September 7, 1909. In the action of 1911 the only right claimed was by prescription. Estoppel by record is confined to matters directly decided by the Court and the bar created is limited by the extent of the remedy claimed and refused: *Bainbrigge* v. *Baddeley* (1); *Toulmin* v. *Copland* (2); *Hunter* v. *Stewart* (3); *Moss* v. *Anglo-Egyptian Navigation Co.* (4); *Flitters* v. *Allfrey.* (5) If the defendant had proved in the 1911 action that he had a right to go on the left bank of Brinckmann's land the action would still have been dismissed. The fact that the right claimed in para. 4 of the statement of claim in that case was to go on both banks of the river is immaterial, for the only relief claimed was with regard to the north bank. *Barrs* v. *Jackson* (6)

(1) (1847) 2 Ph. 705.
(2) (1848) 2 Ph. 711, 716.
(3) (1861) 4 D. F. & J. 168, 176.
(4) (1865) L. R. 1 Ch. 108.
(5) (1874) L. R. 10 C. P. 29, 42.
(6) 1 Y. & C. Ch. 585.

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and *Humphries* v. *Humphries* (1) are two cases where the same principle was applied: see also *In re Allsop and Joy's Contract.* (2)

Again the right to pass and repass in a boat on the north side of the river is conferred by the conveyance of 1845. It is a right that had previously been "used or occupied" with the mill within the terms of the conveyance of 1845. If the conveyance did not give the right to clear the weed Kidman the grantor could have left it to grow and stopped the mill from being worked: compare *Roberts* v. *Fellowes.* (3) The construction of the conveyance is for the Court, and evidence is admissible of all material facts existing at the time of execution: Gale on Easements, 9th ed., pp. 78, 79. Here however the deed is an ancient one, and no evidence can be given of user at that time; but modern usage and enjoyment for a number of years is evidence to prove contemporaneous usage and enjoyment: *Waterpark* v. *Fennell.* (4)

[*A. Grant K.C.* referred to Norton on Deeds, pp. 148, 149, and *North Eastern Ry. Co.* v. *Lord Hastings.* (5)]

In that case a deed executed in 1854 was being considered in 1900. Here the interval of time is far greater and the deed is an ancient one, whilst the evidence shows that for many years there has been a right to clear the northern half of the river by the use of a boat. Again, a right to go up the south bank to clear weed and repair the bank passes under the deed of September 7, 1909, by virtue of the grant of "the full and free liberty of the stream watercourse water and river." Without that right, the flow of the stream would have stopped and the mill with it. But even if it did not pass under those words, it passes under the general words read into the conveyance by virtue of s. 6, sub-s. 2, of the Conveyancing Act, 1881. This section applies not only to quasi-easements which are continuous and apparent at the time that the dominant and servient tenements are severed but also to rights of way enjoyed with the premises at the time of the

(1) [1910] 2 K. B. 531.
(2) (1889) 61 L. T. 213, 215.
(3) (1906) 94 L. T. 279, 280.
(4) (1859) 7 H. L. C. 650, 684.
(5) [1900] A. C. 260.

severance: Gale on Easements, 9th ed., pp. 87, 91, 101, 102, 103; *Kay* v. *Oxley* (1); *Broomfield* v. *Williams* (2); *International Stores* v. *Hobbs* (3); *Hansford* v. *Jago* (4); *White* v. *Williams*. (5) A user for pleasure only does not pass any right on severance, but a user for convenience does. The words of the Act are the widest found in any of the old conveyances, and all quasi-easements pass thereunder on severance: *Bayley* v. *Great Western Ry. Co.* (6); *Watts* v. *Kelson* (7); *Wardle* v. *Brocklehurst* (8); Gale on Easements, 9th ed., p. 92.

A. Grant K.C. in reply. Where an owner parts with a portion of his property to a purchaser and retains the remainder, the implication of a grant of an easement arises by virtue of the principle that a grantor may not derogate from his grant, whenever the easement is necessary to enable the grantee to accomplish some object which the conveyance itself or the circumstances of the grant show was intended to be achieved. When there is a simultaneous grant by a single grantor to different purchasers, as here, the principle of derogation from grant is no longer applicable, and the only easements that will be implied in favour of one purchaser over the land conveyed to the other purchaser are easements of necessity and continuous and apparent easements or quasi-easements: see Gale on Easements, 9th ed., p. 114, and *Browne* v. *Flower* (9), as to the nature of a continuous and apparent easement. An easement may also be inferred by the existence of a formed way as being a continuous and apparent indication of what may be a right. The defendant cannot bring his case within any of these and must show an express grant. In support of this he relies on s. 6, sub-s. 2, of the Conveyancing Act, 1881, and particularly on the words "advantages . . . . occupied and enjoyed" with the property conveyed. On their true construction these words carry only such advantages as at the time of the simultaneous conveyances were being enjoyed by the one part of the property

(1) (1875) L. R. 10 Q. B. 360.
(2) [1897] 1 Ch. 602.
(3) [1903] 2 Ch. 165, 169, 172.
(4) [1921] 1 Ch. 322.
(5) [1922] 1 K. B. 727.
(6) (1884) 26 Ch. D. 434, 447.
(7) L. R. 6 Ch. 166.
(8) (1859) 1 E. & E. 1058.
(9) [1911] 1 Ch. 219, 225.

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over the remainder or were physically attached to one property as against the other. It does not pass advantages enjoyed merely by reason of unity of possession. In practically all the cases cited in which a right has passed upon the severance of property hitherto in the seisin of one person, a part of the property has been let to a tenant who has been in enjoyment of the advantage which passes over the rest of the property. The only exception is *Broomfield* v. *Williams* (1) but there were in that case physical indications of the right claimed. There are two other cases: *James* v. *Plant* (2) and *Barkshire* v. *Grubb* (3), both partition cases and capable of explanation on other grounds.

Again, the conveyance of 1845 did not pass a right to ascend the river by boat, for the evidence shows that no boat was used on the river at this point till some years later. Further, the words in the conveyance of 1909 were identical with those in the deed of 1845 and could carry no additional rights. No prescriptive right such as has been claimed has been proved. Lastly, with regard to estoppel, the test whether there is estoppel is that laid down in Taylor on Evidence, 11th ed., vol. ii., pp. 1158, 1159; see also *Hunter* v. *Stewart* (4); and applying that test here the estoppel extends to the right claimed on the south bank as well as that on the north bank.

Cur. adv. vult.

March 28. SARGANT J. delivered the following written judgment: The plaintiff is the riparian owner of both sides of the River Granta at Linton in the county of Cambridge. The defendant is the owner of the land on both sides of the said river, immediately below the plaintiff's land, and of an ancient water mill called Hadstock Mill, erected on part of the defendant's land. The course of the river through the plaintiff's land and for some distance above is, generally speaking, from east to west; and it is in my judgment the same that it has been for some hundreds of years, as is indicated by

(1) [1897] 1 Ch. 602.
(2) (1836) 4 Ad. & E. 749.
(3) (1881) 18 Ch. D. 616.
(4) 4 D. F. & J. 168, 176.

the fact that the boundary between the counties of Essex and Cambridge is for some distance along the bed of the river. I reject the suggestion of the defendant (though the point may be of small consequence) that the ancient or natural course of the river was along a ditch on the plaintiff's land to the south of the river. On the contrary, this ditch has, in my judgment, been caused by the flow through an artificial drain which was constructed under the river to drain land lying to the north of the river above the plaintiff's land. The land higher up the river on both sides, that is, to the east of the plaintiff's land, belongs to Pembroke College, Cambridge.

The general lie of the land on both sides of the river is shown by some very careful sections that were prepared by a surveyor, Mr. Green, who gave evidence for the plaintiff. The land on the right bank or north of the river is higher than that on the south, and there is no danger of any considerable overflow on the north bank, which would affect the flow of the water to the defendant's mill. Indeed, the defendant himself admitted that the only result of an overflow on the north bank would be to submerge some part of the plaintiff's land and garden there, and not to carry any part of the overflow past the defendant's mill. On the other hand, the land on the south bank of the river slopes away from the bank to the extent of some 3 feet or 4 feet in 150 to 200 feet, while the normal height of the river is within some 12 inches of the top of the bank. It is obvious, therefore, that the maintenance of the full or normal head of water in the river for the purposes of the defendant's mill depends on the stability of the south bank of the river. And if the south bank were to be allowed to fall into disrepair, or were gradually washed away, the utility of the defendant's mill (so far as dependent on water power) would be seriously affected, and might ultimately disappear, the overflow on the south reaching the river at a point below the mill. It is, however, observable, that with the bank in its present condition the first point at which an overflow would occur (and, therefore, apart from accidents the crucial point) is not on the plaintiff's land, but on the land higher up the river on the south side belonging

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to Pembroke College. At this point the normal level of the river is within five inches of the top of the bank; that is, the bank is some seven inches lower than at any point on the plaintiff's land.

It must, I think, be taken that the south bank of the river, both on the plaintiff's land and higher up, is not entirely a natural bank, but that it has gradually been raised and maintained over a very long period of time to prevent the overflow of the river on that side. How far this has been done to protect the land adjoining the bank from the risk of overflow, which would obviously be increased by the backing up of the water by the defendant's mill, and how far it has been done to ensure that a proper head of water should be secured to the mill, it is impossible to say. There is no trace of any actual agreement on the subject between the upper and lower riparian proprietors prior to the year 1845, when the story opens, or indeed since that date. Probably, as in so many cases, it was a case of the various parties looking after their own immediate interests. The upper riparian proprietors, such, for instance, as Pembroke College, had a sufficient interest in preserving their lands from overflow to render it worth their while to keep up their part of the south bank; and the lower riparian proprietor—namely, one Kidman, who in 1845 owned the land on both banks from the Pembroke College boundary down to and including the mill—had an interest both in preserving his adjoining land on the south from flooding, and in keeping up a sufficient head of water for his mill. Had Pembroke College neglected the south bank, with consequential damage to the mill, that would, no doubt, have resulted in complaint from Kidman and negotiation between him and the College. On the other hand, had Kidman by act or neglect increased the damming effect of the mill so as to render the College land more liable to flood, that would probably have resulted in complaint from them. As it is, I cannot infer, nor indeed have I been asked to infer, anything more prior to the year 1845 than a general acquiescence in the existing state of things. It is, however, the fact that the lands above the plaintiff's land

are, and probably have been for a long time past, very liable to floods, as indeed one would expect in the case of a sluggish river of this kind (the surveyor took the water level as the same throughout the whole length of the river which he surveyed) flowing at a normal level above the surface of the adjacent lands.

It is not, however, necessary to pay any further regard to what may be considered to be the legal relations between the upper and lower riparian owners on this part of the Granta. For I understand Mr. Greene for the defendant to disclaim expressly the suggestion that the upper riparian lands of the plaintiff (whether the banks or the bed of the river) were subject to any right on the part of the defendant, which arose merely from the relative position on the river of their respective tenements. He based himself solely on the rights arising either by virtue of the conveyances I have now to state, or on those arising under the Prescription Acts from user for the requisite periods prior to his defence and counterclaim. [His Lordship then stated the facts as above and continued :] In that state of the facts and the pleadings, the first question that I have to deal with is that of res judicata. Mr. Greene for the defendant admitted that the former action did so operate, and completely estopped the defendant, as regards any right to come on the north bank for the purpose of repair or removing weeds under any title whatsoever. But he contended that the subject matter of that action was limited to this smaller right ; and that the judgment dismissing the action did not necessarily include, or operate as an estoppel in respect of, any similar right with regard to the south bank. I am, however, unable to take this view. The right pleaded and relied on in that action was one entire right to come on both banks, or either bank, of the river for the purposes in question ; and, though the act of obstruction complained of was only in regard to the north bank, it was pleaded as a violation of the right as alleged, that, is as an entirety. The act of obstruction being admitted by the then defendant—the present plaintiff—and no distinction being drawn by him between any right in

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respect of the north bank and any similar right in respect of the south bank (for the statements contained in para. 5 of the defence in that action as to the attitude of the then defendant as to both the north bank and the south bank were in my view merely indications of neighbourly friendliness, and were not in any way admissions of right conflicting with his general denial in para. 4 of the defence), it seems to me that the complete dismissal of the action was incompatible with the existence of the right claimed, and involved the negation of it. It will also be noticed that in the present action, again, what was throughout claimed on the pleadings by the present defendant is the same entire and apparently indivisible right in respect of both banks which was claimed in the former action, though the right is somewhat extended so as to include a right to clear away the weeds not only from the banks, but by means of boats—a right very difficult to dissociate from a right in respect of the banks, in view of the fact that half the bed of the river on each side is prima facie held and passes with any ownership or conveyance of the adjoining bank.

I may add that of the cases quoted to me as to the extent of the res judicata in the present action—namely, as to whether it applied to both banks or to the north bank only—that most in point seems to me to be a decision of the Privy Council in *Badar Bee* v. *Habib Merican Noordin*. (1)

In order, however, that the questions between the parties might be determined on their merits, should my view as to the extent of the estoppel created by the former action be wrong, I allowed on terms an amendment of the pleadings by the defendant, so as to set up (1.) a claim to use the south bank of the river for repairing it and for cutting weeds under the grant in the indenture of September 7, 1909, and (2.) a claim to pass over the bed of the river by boats for the purpose of cutting weeds, either by prescription as to the whole, or, as to the northern half of the bed, by virtue of the grant in the conveyance of 1845, and as to the southern half by virtue of the grant in the indenture of September 7, 1909.

(1) [1909] A. C. 615.

These less extensive rights have to be considered separately with relation to the respective sources from which they are claimed to have originated.

I will consider, first, the right claimed to use boats over the northern half of the river bed under the grant in the conveyance of October 11, 1845. The claim is based on the grant of Hadstock Mill and its curtilage "together with the full and free liberty of the stream watercourse water and river there running and over which the said mill stands as the same is now or has been used and occupied with the said mill." These words prima facie indicate that the grantee is to stand in the same position with regard to the use and flow of the stream in connection with the mill as the grantor had stood, whether with regard to the use of the water against lower riparian proprietors, or with regard to the right to receive the flow of the stream or to back it up in relation to upper riparian proprietors. They do not in terms refer to the flow of the stream otherwise than in the mill grounds and curtilage, and have no apparent connection with the plaintiff's lands on the south bank (which are only conveyed later in the deed by way of a covenant to surrender), or to the half bed of the river adjacent thereto. Still less do they refer to the plaintiff's lands on the north side of the river, including the bed of the river adjacent thereto. For though those lands at that time belonged to Kidman and were retained by him, there is no mention of them or of their extent, and no attempt to give any express rights in regard thereto. The grantee under that deed would by virtue of the covenant to surrender in the later part of the deed acquire the plaintiff's lands south of the river and half of the adjacent bed, and have the ordinary rights of a riparian owner, which would, under the ordinary give and take and courtesy of neighbours, include boating over the whole bed of the river. But it is, in my opinion, an untenable claim to say that the words of grant I have read do more than prevent the grantor from interfering with the flow of the stream to the mill, or from complaining of the backing up of the water, or give affirmatively to the grantee a definite right of coming in boats over the northerly half

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of the bed of the river along the grantor's land for the purpose of cutting weeds or doing other like acts to preserve the flow of the stream. No authority has been quoted to me for any such construction; and it is not immaterial to observe that the first use of a boat for that purpose of which there is any evidence is at a date some years after the purchase by Nichols from Reeve in the year 1884. I need hardly add that the general words of the conveyance of 1845 as to easements advantages etc. "belonging or in any wise appertaining" to the mill are clearly insufficient to pass any such right as claimed, even had boats been previously used by Kidman for the purpose.

I turn now to the claim of the defendant by prescription to pass over the bed of the river by boats for the purpose of cutting weeds. The earliest date at which the user of boats for this purpose is suggested is a few years after the purchase of the mill in 1884 by Nichols; and, therefore, a few years only before the purchase of the land on the north by Brinckmann. It is, therefore, absolutely necessary, if the defendant would succeed on this ground, that he should establish a user as of right of a boat for this purpose during the whole, or, at all events, a great part of the period between 1891 and 1908, when Nichols owned and occupied the south bank and Brinckmann owned and occupied the north bank. But the facts during this period are altogether insufficient to establish any such user as of right. Nichols and Brinckmann had married sisters, and were on the friendliest terms; and, indeed, this connection seems to have been the reason for Brinckmann building a house and settling at Linton. Wright, the servant of Nichols, and the principal witness on this part of the case, was allowed by Nichols from time to time to assist Brinckmann's man in repairing the north bank; was "tipped" by Brinckmann for so doing; and said that Brinckmann took no more notice of him than of one of his own men. Further, Brinckmann himself was interested in the cutting of the weeds, though probably not to the same extent as Nichols, and used himself to cause them to be cut, at any rate along the north bank. And, finally, when the opposite

banks of an ordinary non-navigable stream are in separate ownership and occupation, the ordinary every-day relationships between the two riparian owners admit of the user of the stream by either of them for such purposes as boating and fishing, without any meticulous examination of the question whether the boat or the blades of the oars, or the lure for the fish, may be on the one side or the other of the medium filum of the bed. It would be a monstrous result if the continuance of such a state of things during the statutory period should be liable to create a legal easement; and the anomaly would be the greater, if the acts relied on were not acts obviously to the prejudice of the opposite riparian owner, but on the contrary either natural in character or for the common benefit of both. And although there is no limit to the kinds of easements that may be acquired by grant or prescription, and, therefore, it is theoretically possible that a riparian owner on one side of a river might acquire an easement over the opposite half of the bed to use a boat for the purpose of cutting weeds, it is obviously very difficult to establish that there has in fact been a user of such a privilege in avowed excess of the ordinary user by a riparian owner, and as of right. Indeed, the liability to have such inferences drawn from occasional excess of their strict legal rights would put a stop to the exhibition, between opposite riparian owners, of the ordinary amenities and courtesies of neighbours. In my judgment the defendant is very far indeed from having established in his favour any right by prescription to use boats on the river between the plaintiff's lands for the purpose of weed cutting.

Finally, I have to deal with the right, said to have been created by the conveyance of September 7, 1909, of entering on the south bank of the plaintiff's land for the purpose of repairing the bank and cutting weeds therefrom. Some reliance was placed by the defendant on the circumstance that the parcels relating to the mill, which are included in the first part of the schedule to this conveyance, expressly mention (as in the previous indenture of 1845) "the full and free liberty of the stream watercourse water and river there

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running and over which the said mill now stands as the same is now or has been occupied with the said mill." As to this, however, the same reasons prevent me from giving the desired effect to these words as against upper riparian lands which have already prevented me from giving such an effect in the case of the like words in the indenture of 1845. And there is this additional reason for taking this view, so far as the conveyance to the defendant in the year 1909 is concerned—namely, that the matter has in my judgment to be considered on the basis that the defendant and Brinckmann were both purchasers at the auction in 1908, and that the conveyances to them respectively in the year 1909, though separated by an interval of some seven days, must in all the circumstances of the case, and having regard to the delay occasioned in each case by intermediate arrangements for enfranchisement of part of the property sold and for the adjustment of the boundaries between the properties, be considered as contemporaneous conveyances. This being so, I do not think that the defendant can, by virtue of the express insertion in the parcels of his conveyance of the words previously used as to the full and free liberty of the stream, be considered as placed in a better position with regard to Brinckmann than was contemplated by the particulars and conditions under which they both purchased. And the statement in those particulars with reference to Lot 1, that the mill had "a full and constant supply of water from the River Granta which runs through the property," seems to me merely to state a physical fact, and not to express or imply that the purchaser of Lot 1 would be granted special rights of entry over Lot 2 for the purpose of repairing the banks of that lot or cutting weeds.

It is, however, on other words expressed or implied in the conveyance of September 7, 1909, that the main argument of the defendant has been based. Under the Conveyancing Act, 1881 s. 6, sub-s. 2 (I refer to this sub-section, as it is the one dealt with in the argument, though I am not sure that it is not the very similar language of sub-s. 1 that is the more applicable), it is enacted that: "(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to

include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof." The defendant says, and says truly, that during the common ownership and occupation by Nichols and his widow of the defendant's land (or Lot 1) and of the plaintiff's land (or Lot 2) the common owner and occupier was accustomed, when occasion arose, to proceed from the south bank within Lot 1 to the south bank within Lot 2, and to repair the south bank and cut weeds within the limits of Lot 2. And on these facts it is contended for the defendant that this constituted a "privilege easement right or advantage" over or in relation to Lot 2, which at the time of the conveyance was occupied or enjoyed with Lot 1; and accordingly, that this advantage passed to the defendant by virtue of the express words of the sub-section as included in the conveyance by virtue of the statute. The argument is not based in any way on the existence of any continuous and apparent easement existing over Lot 2 in favour of Lot 1; indeed, any such claim would be incompatible with the evidence, which clearly establishes that there was no defined way at all along the south bank. The claim is founded upon there having been a statutory introduction into the conveyance to the defendant of words equivalent to or identical with those either expressly contained or statutorily introduced in the corresponding conveyances in such cases as *James* v. *Plant* (1); *Watts* [v. *Kelson* (2); *Bayley* v. *Great Western Ry. Co.* (3); and *White* v. *Williams*. (4)

It is, therefore, necessary for the purpose of dealing with

(1) 4 Ad. & E. 749.
(2) L. R. 6 Ch. 166.
(3) 26 Ch. D. 434.
(4) [1922] 1 K. B. 727.

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the matter on this footing to consider whether, during the common ownership and occupation of Lot 1 and Lot 2 by Mr. Nichols and his widow, and therefore at the date of the conveyance, there was a "privilege, easement, right or advantage" of the kind now claimed, which can properly be said to have been "demised, occupied or enjoyed" with Lot 1 over Lot 2. It is very difficult to see how this can have been the case. No doubt the common owner and occupier did in fact repair the bank of Lot 2, and cut the weeds there; and no doubt also this repair and cutting would enure not solely for the benefit of Lot 2 (which comprised, amongst other things, a lawn tennis court), so as to prevent its being flooded, but also and very likely to a greater extent for the benefit of Lot 1. But there is nothing to indicate that the acts done on Lot 2 were done otherwise than in the course of the ownership and occupation of Lot 2, or that they were by way of using a "privilege, easement or advantage" over Lot 2 in connection with Lot 1. The common owner and occupier of Whiteacre and Blackacre may in fact use Blackacre as an alternative and more convenient method of communication between Whiteacre and a neighbouring village. But it has never been held, and would I think be contrary to principle to hold, that (in default of there being a made road over Blackacre forming a continuous and apparent means of communication) a sale and conveyance of Whiteacre alone would carry a right to pass over Blackacre in the same way in which the common owner had been accustomed to pass. As it seems to me, in order that there may be a "privilege, easement or advantage" enjoyed with Whiteacre over Blackacre so as to pass under the statute, there must be something done on Blackacre not due to or comprehended within the general rights of an occupying owner of Blackacre, but of such a nature that it is attributable to a privilege, easement, right or advantage, however precarious, which arises out of the ownership or occupation of Whiteacre, altogether apart from the ownership or occupation of Blackacre. And it is difficult to see how, when there is a common ownership of both Whiteacre and Blackacre, there can be any such

relationship between the two closes as (apart from the case of continuous and apparent easements or that of a way of necessity) would be necessary to create a "privilege, easement, right or advantage" within the words of s. 6, sub-s. 2, of the statute. For this purpose it would seem that there must be some diversity of ownership or occupation of the two closes sufficient to refer the act or acts relied on not to mere occupying ownership, but to some advantage or privilege (however far short of a legal right) attaching to the owner or occupier of Whiteacre as such and de facto exercised over Blackacre. Let me illustrate my meaning from the latest case on the subject—namely, *White* v. *Williams*. (1) Assume that the facts there had been that the grantor of Tydden Mawr had been the absolute owner in possession both of that upland farm and of the 772 acres of the adjoining mountain which were called Craig Goch, and that he had been accustomed for many years past, and as a regular practice, to remove his sheep from Tydden Mawr and to depasture them on Craig Goch during certain months of the year; it seems to me indisputable that, on a sale and conveyance of Tydden Mawr alone, the purchaser would not have obtained from the words of the statute the right to take his sheep from Tydden Mawr and graze them on Craig Goch during the months in question. And I understood Mr. Greene not to contend otherwise. The vendor would have been enjoying in fact at the date of the conveyance the advantage of taking his sheep from Tydden Mawr and grazing them on Craig Goch; but that advantage would have been one that he possessed and enjoyed as the owner and occupier of Craig Goch, and not as an advantage enjoyed with or as an incident of his ownership and possession of Tydden Mawr.

Mr. Greene for the defendant was challenged to produce from the very many cases in which, on a conveyance of Whiteacre, an easement over Blackacre has been held to pass under the statutory words or their equivalent, a single case in which both the closes in question had been in common ownership and occupation, or in which there had not been

(1) [1922] 1 K. B. 727.

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an actual enjoyment over Blackacre on the part of an owner or occupier of Whiteacre who was not the owner and occupier of Blackacre. And neither from among the cases cited to me, nor from any other case in the books, was he able (with one solitary exception) to produce such a case as required. The exception, however, is one of high authority —namely, that of *Broomfield* v. *Williams* (1)—and it is necessary to examine it with some attention.

In that case the common owner of a house and of adjoining land over which light had in fact been received through the windows of the house, sold and conveyed the house by a conveyance after the date of the Conveyancing Act, 1881, but retained the adjoining land. It was held by the Court of Appeal that, although the retained land was marked on the plan on the conveyance as "building land", the vendor was not at liberty subsequently to build on the retained land so as to interfere substantially with the access of light to the windows of the house. A. L. Smith L.J., it is true, based his judgment solely on the principle that the grantor was not entitled to derogate from his grant; and this was quite sufficient to support the actual decision. But the other two members of the Court relied mainly, if not exclusively, on the express words of s. 6, sub-s. 2, of the Act; and the decision is, therefore, undoubtedly binding on me with regard to the access of light, and also with regard to any other "privilege, easement, right or advantage" that is on the same footing as "light."

But such an easement or advantage as is now claimed is, in my judgment, very different from light, or a right to light. The access of light to a window over adjoining land is a physical fact plainly visible to any one buying a house. It is extremely similar to a continuous and apparent easement. It is mentioned in the sub-section in the midst of a number of physical features ending with the word "watercourses"; and the special position of light to an existing window as compared with other easements is fully recognized in the Prescription Act, which makes the acquisition of an easement of light depend on the enjoyment of the light simpliciter,

(1) [1897] 1 Ch. 602.

and not, as in the case of other easements, on enjoyment as of right. The fact, therefore, that the inclusion of light in the subject matter of conveyance in s. 6, sub-s. 2, has been held to entitle the grantee to the light coming to an existing window, does not necessarily involve the further inclusion of imperceptible rights or advantages, corresponding with intermittent practice or user as between two tenements of the common owner and occupier of both. Such an intermittent and non-apparent user or practice stands, in my judgment, on a completely different footing from the visible access of light to an existing window.

The importance of such a distinction is specially obvious in a case like the present, where there is a contemporaneous sale by a common owner to two separate purchasers of adjoining lots completely divided by a physical boundary. If the contention of the defendant is correct, it would be necessary in any such case for the purchaser to inquire how the common owner and occupier had been accustomed to make use of each close in connection with the other. Would the plaintiff, for instance, in this case be entitled, as against the defendant, to an alternative way over Lot 1 to reach Lot 2, because while both lots were in common ownership and occupation, it was the practice of Mr. and Mrs. Nichols by way of Lot 1 to repair the south bank of Lot 2? Any number of similar puzzles would arise, if the law were as the defendant would have it. The fact that the common owner and occupier sells two adjoining closes separately is, in my mind, a negation of the intention to preserve access between them: compare such a case as *Midland Ry. Co.* v. *Gribble.* (1)

The only two exceptions to this rule appear to be those of ways of necessity and of continuous and apparent easements. Had the general words of s. 6, sub-s. 2, any such effect as is suggested by the defendant—and it must be remembered that these words were not new, but represented conveyancing practice for many years previously—it is difficult, if not impossible, to understand how there have not been numerous cases in which, on a severance of two closes, a subsisting practice by the common owner and occupier of

(1) [1895] 2 Ch. 827.

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both has not been given effect to by way of legal easement as a result of general words of this kind.

Something has been said on behalf of the defendant as to the importance of this case to millers in general, and as to the danger which a decision in favour of the plaintiff might cause to the legitimate rights or expectations of this class of persons. This argument would carry greater weight if the defendant's claim were based on any general claim of right in such cases as between upper and lower riparian owners, and not on the special rights said to have been created by the particular facts and documents in this case. As it is, my decision depends on the special facts of this case, and is not one of any very general application as regards mills. Nor do I think that even in this particular case the defendant is in any real danger. I gathered from the plaintiff, and anticipate, that he has no intention of abandoning the reasonable attitude which was adopted by Brinckmann in the former proceedings, and has been adopted by the plaintiff himself in the witness box. The plaintiff, as far as I can see, was forced into bringing the present proceedings by the broad and aggressive claims of right made by the defendant. And I have no reason to doubt that, when these proceedings are at an end, the plaintiff will allow the defendant, not as a matter of strict right, but as one of neighbourly courtesy, sufficient opportunity of clearing away weeds and repairing the bank along the plaintiff's length of the river; and that, none the less, because the result of so doing would enure to the advantage of the plaintiff as well as of the defendant.

I propose to grant a declaration and an injunction as claimed by heads 1 and 2 of the plaintiff's claim; and I award him 40*s.* damages for the defendant's trespass. The defendant must pay the plaintiff's costs of the action to be taxed. The counterclaim is dismissed with costs. (1)

Solicitors: *Bird & Eldridges, for Ernest Vinter, Cambridge; Young & Sons.*

(1) The defendant appealed. The appeal was opened before Lord Sterndale M.R., Warrington and Younger L.JJ., on June 12 and 13, 1923, but the parties ultimately agreed to a compromise of the action.

H. C. G.

THOMPSON *v.* THOMPSON.

SARGANT J.

[1874. T. 104.]

1923

March 22, 23, 26; *April* 16.

Money in Court—Administration Action—Transfer of Funds to separate Account—Incorrect Title of Account—Res judicata—Order of Master—Jurisdiction—R. S. C., Order LV., *r.* 2.

An order in an administration action directing that a fund in Court shall be carried over to a separate account does not amount to a definite and conclusive ascertainment and declaration of right so as to operate as a res judicata and deprive the person really entitled of the fund in favour of the persons named or indicated in the title of the separate account.

In re Jervoise (1849) 12 Beav. 209 explained.

Peareth v. *Marriott* (1882) 22 Ch. D. 182; *In re Eyton* (1890) 45 Ch. D. 458; and *Edgar* v. *Plomley* [1900] A. C. 431 discussed.

It is not within the jurisdiction of a Master under Order LV., r. 2, to make an order on summons in chambers that a fund in Court exceeding in value 1000*l.* shall be carried over to a separate account.

PETITION.

The following statement of the facts is substantially taken from the judgment.

By the will of the testator, John Thompson, which was made on February 8, 1864, and which took effect on his death on September 14, 1874, his residuary estate after payment of debts and legacies and subject to an annuity to his widow (who died in the year 1886) was directed to be divided into six equal shares, one for each of his five daughters Emily (Mrs. Gisby), Adela (Mrs. Tulk), Georgiana (Mrs. Hodges), Cecilia and Ann Ellen, and the remaining share for the widow and three children of his late son John Thompson. And after settling the share of his said late son the testator directed that the original share of each of his five daughters should be held by his trustees upon trust to pay the income to her during her life for her separate use without power of anticipation (and with a provision for forfeiture in case of attempted alienation as therein mentioned), and after the death of each daughter upon trust to apply the income of her share as the trustees should think fit for the maintenance and education of her children until

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they respectively attained the age of twenty-five years, and then to divide such share and the income thereof between such children equally, and if only one such child should attain that age then upon trust for such one absolutely. But if any of the said five daughters should not have a child who should attain the age of twenty-five years, then as to as well the original share of such daughter as any share or shares the income whereof might accrue to her under the provision now in statement, the trustees were to hold such share or shares and the income thereof upon trust during the lives and life of the others of the said five daughters and the survivors and survivor of them to pay and apply such income to the persons and in the manner to whom and in which the income of the original share and shares of the said other daughters respectively in the said residuary estate were thereinbefore made payable and applicable. And on the death of the last survivor of the said five daughters or on her forfeiture under the preceding trusts of the said income, then in trust for such of the children of the said five daughters and of the testator's son John Thompson as should be living at the death of the last survivor of the said five daughters or at the date of such forfeiture as last aforesaid equally individually per capita.

An action for the administration of the testator's estate and the execution of the trusts of his will was commenced shortly after his death, and a decree therefor was pronounced on November 7, 1874. By an order on further consideration made on July 8, 1878, a sum of 13,333*l.* 6*s.* 8*d.* Consols was provided for the purpose of meeting the annuity for the testator's widow and placed to a separate account for that purpose; various sums of Consols and cash were carried over to five separate accounts respectively, of which the first was called "The account of the Testator's daughter Emily Gisby for life, subject to duty on the capital," and four others were similarly labelled as being for the account of the testator's four other daughters; and a sixth amount of Consols and cash was ordered to be paid in equal shares to the trustees of settlements which had been executed by the three daughters of the testator's deceased son John Thompson. And

subsequently on the death of the testator's widow, the fund set aside to secure her annuity was as to five sixth parts ordered to be carried over to each of the said five separate accounts in favour of the testator's five daughters, and as to the remaining sixth part was dealt with for the benefit of those claiming under the said three settlements of the three daughters of the testator's said deceased son. Under the two last mentioned orders the incomes of the sums carried over to the said five separate accounts were directed to be paid to the testator's five daughters respectively for life or until further order.

The first of the testator's daughters to die was the said Ann Ellen Thompson. She died on August 15, 1900, having by her will dated July 17, 1896, bequeathed the residue of her personal estate to one Henry Armstrong and appointed him sole executor. And by an order made on summons in chambers by the Master on January 15, 1901, being the order now in question, it was ordered (in the presence of, amongst other persons, the said Henry Armstrong) that the apportioned amount down to her death of the income of the funds in Court to her separate account should be paid to the said Henry Armstrong as her executor and that the whole residue of the funds standing to that account after provision for duty and costs should be carried over to an account entitled "The account of the children of Testator's five daughters and of his son John Thompson living at the forfeiture by or the death of the last survivor of his said daughters subject to duty," and that the interest as it accrued due on the funds so to be carried over should be paid in fourths to the said Emily Gisby, Adela Tulk, Georgiana Hodges and Cecilia Thompson.

It is quite clear and is now admitted on all hands that this order was entirely wrong. The trusts in favour of the children of each of the testator's daughters were void for remoteness, and for the like reason all the trusts over on failure of such children were also void. And therefore on the principle of such cases as *Hancock* v. *Watson* (1) the original gift in favour of each of the said daughters stood, and the

(1) [1902] A. C. 14.

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funds standing to the credit of Ann Ellen Thompson for life in fact formed part of her estate and should have been paid to her executor, Henry Armstrong. He and his solicitors, however, seem to have been entirely ignorant of his rights. He had sworn her estate as being of the value of some 283*l.* only, and his solicitors apparently accepted without demur the apportioned amount of the dividends on the funds in Court as being all that was his. He died a few days after the order—namely, on January 20, 1901—and his legal personal representatives were apparently not served with any subsequent proceedings in the administration action, as indeed was not necessary had Ann Ellen Thompson been a tenant for life only. And there seems to have been nothing to call his or their attention specially to the doubts that were in fact entertained subsequently, if not previously, as to the efficacy of the settlements purporting to have been effected by the testator's will of the shares of the testator's five daughters.

Mrs. Georgiana Hodges died on February 22, 1905, having had one child only—namely, Matilda Louisa Hodges—who mortgaged her share in the testator's estate to the London Assurance by an indenture of March 31, 1886. Subsequently doubts seem to have been entertained by the mortgagees as to this lady's title to the share, for by deed poll dated May 31, 1888, Mrs. Georgiana Hodges assigned all her share in the testator's estate to her said daughter, and the latter by an indenture of the same date assigned the said share to the London Assurance by way of confirmation of the previous mortgage. And by an order made by Buckley J. on April 13, 1905, upon the petition of the London Assurance and the legal personal representative of Mrs. Georgiana Hodges it was declared that there was no intestacy with regard to the share of the testator's estate given to his said daughter, and it was amongst other things ordered that part of the securities in Court to the credit of "The account of the Testator's daughter Georgiana Hodges for life subject to duty on the capital" should be sold and the proceeds paid to the London Assurance as mortgagees.

Mrs. Emily Gisby died intestate on November 14, 1909, having had two children, Emily Dorothy Gisby and George Henry Gisby, both of whom mortgaged their shares. By an indenture dated March 4, 1890, Mrs. Emily Gisby assigned her share in the testator's estate to her said two children in equal shares, and they subsequently confirmed the mortgages they had already made. On Mrs. Gisby's death, therefore, her children and their mortgagees were entitled, whether the share had vested in them or their mother. And by an order dated January 11, 1910, and made on petition, the funds representing Mrs. Gisby's share were ordered to be paid out to the said two children and their mortgagees.

Mrs. Adela Tulk died on April 10, 1915. On her death a contest arose as to one third of the funds representing her share between the Law Reversionary Society claiming as derivative assignees of shares or interests of her children and certain trustees of a settlement effected by the said Adela Tulk in her lifetime. And by an order made on petition by Younger J. on May 21, 1915, and subsequently affirmed by the Court of Appeal, it was declared that the trusts of the will of the testator of the income and capital of the original share of each of his five daughters were invalid as regards the share of the said Adela Tulk and that she was absolutely entitled to her said original share in the said residuary estate. And it was ordered that the third share in question be transferred to the trustees of the settlement made as aforesaid by the said Adela Tulk.

Notwithstanding the doubts that had been raised as aforesaid as regards the shares of Mrs. Gisby and Mrs. Hodges and the decision arrived at with regard to the share of Mrs. Adela Tulk, no corresponding doubt appears to have been entertained as to the correctness of the order of January 15, 1901. And by orders made successively by the Master in chambers on the respective deaths of Mrs. Hodges, Mrs. Gisby and Mrs. Tulk the income of the funds standing to the credit of the separate account directed by the said order of January 15, 1901, was directed to be paid first

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to Mrs. Gisby, Mrs. Tulk and Miss Cecilia Thompson in equal thirds, then to Mrs. Tulk and Miss Cecilia Thompson in moieties, and finally to Miss Cecilia Thompson alone.

Miss Cecilia Thompson died on December 30, 1922, and the present petition has been presented for the purpose of dealing with three sets of funds—namely, (1.) the funds standing to the credit of the account of the testator's daughter Cecilia Thompson for life subject to duty on the capital; (2.) a comparatively small fund set aside to a separate account to meet duties on capital under the specific provisions of the testator's will; and (3.) the funds representing the original share of the testator's daughter Ann Ellen Thompson, which had been carried to the separate account created by the order of January 15, 1901. The only question calling for report arises with regard to the third fund, consisting of 266*l.* 13*s.* 9*d.* India Stock and 8271*l.* 16*s.* 3*d.* Consols. It is whether this fund was conclusively determined by the order of January 15, 1901, to belong to the children of the testator's five daughters, and of his son John Thompson living at the death of the said Cecilia Thompson, so as to operate as a res judicata and bar the right of the legal personal representatives of Ann Ellen Thompson.

Greene K.C. and *A. Adams* for the petitioners. In view of the order made by the Master on January 15, 1901, in the presence of Ann Ellen Thompson's executor, it is too late for a claim to be successfully made by her estate to her share. The order was not ultra vires the Master. It is the practice to make orders carrying over funds to separate accounts on summons in chambers, even though the amount of the fund in any particular case exceeds 1000*l.*: see Daniell's Chancery Forms, 6th ed., p. 993.

[SARGANT J. On a transfer to a new account there is a payment schedule, so that it is looked on as a payment. Is not the jurisdiction on summons limited by Order LV., r. 2, sub-r. 2, to funds not exceeding 1000*l.* ?]

Under Order LV., r. 2, sub-r. 18, procedure by summons is sanctioned as to " such other matters as the judge may think

fit to dispose of at chambers." In view of the well-settled practice to make orders as to funds exceeding 1000*l.* in chambers, it must be taken to be covered by this sub-rule. In *In re Hicks* (1) Kekewich J. refused to deal with a point of construction on summons in chambers for payment out, as he thought that other classes of business only and not matters of the same nature as those specifically mentioned in the earlier sub-rules of r. 2 could be dealt with under sub-r. 18. It is submitted that the decision was wrong. If the order was intra vires it operates as an estoppel to prevent a claim on behalf of Ann Ellen Thompson's estate. Besides, even if the order was irregularly made, it cannot be set aside now, as it has been acted on for over twenty years. It is an order binding on all parties, and has the same effect as if there was an express declaration of title.

Such a declaration is involved in the title of the account to which the fund was transferred. The whole object of transferring a fund to a separate account is to set it free from claims by persons not mentioned in the title of the account: *Peareth* v. *Marriott*. (2) The importance of giving the correct title to an account is strongly pointed out by Lord Langdale in *In re Jervoise* (3): see also *Edgar* v. *Plomley*. (4) If the order was wrongly made it was for the persons objecting to apply to the judge within a reasonable time to set aside the Master's order: Order LXX., rr. 1, 2. *Peareth* v. *Marriott* (2) is directly in point here, and it was approved by Lord Macnaghten in *Badar Bee* v. *Habib Merican Noordin*. (5)

Spens for trustees.

Tyrrell for other persons interested.

A. Grant K.C. and *G. D. Johnston* for the executors of Henry Armstrong. It would be a grave step to hold that an order transferring a fund to a separate account operated as a declaration of right and it is contrary to the view expressed by Farwell L.J. in *Cloutte* v. *Storey*. (6) Even assuming everything to have been done regularly, yet so long as the fund is

(1) (1894) 63 L. J. (Ch.) 568.
(2) 22 Ch. D. 182.
(3) 12 Beav. 209.
(4) [1900] A. C. 431, 438.
(5) [1909] A. C. 615.
(6) [1911] 1 Ch. 18, 34, 35.

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in Court under the control of the Court it will see justice done between the parties. That is the result of *Cloutte* v. *Storey* (1), and it is confirmed by *Dibbs* v. *Goren* (2) and *In re Eyton*. (3) Again there is nothing in the rules enabling a Master to determine rights. Apparently the practice prevails that the Master should transfer funds to a new account, although over 1000*l*. The result is unfortunate, especially if that transfer is to be regarded as a declaration of right; and the rules do not justify it. In reality when a transfer is made to a new account it is no more than a book-keeping entry intended to facilitate administration, and has no binding force. In *Peareth* v. *Marriott* (4) there had been an adjudication of right.

If it were to be held that the Master's order operated as a declaration of right then leave ought to be given to appeal. The money is still under the control of the Court, and no new rights have intervened to render it inequitable to extend the time for appeal: compare *In re Normanton Iron & Steel Co.* (5)

Greene K.C. in reply. *Cloutte* v. *Storey* (1) has no bearing on this case. All that was decided was that carrying over a fund to a separate account was not equivalent to a transfer so as to pass the legal estate. Further it is contrary to the practice of the Court to give leave to appeal years after a decision.

Cur. adv. vult.

April 16. SARGANT J. delivered the following written judgment: On this petition the first and main question to be decided is whether an order made in the year 1901 by a Master in chambers for the carrying over of a fund of over 9500*l*. nominal in securities and cash to a separate account has operated as a res judicata, so as to deprive the persons really entitled to the capital of the fund in favour of the persons named or indicated in the title of the separate account. [His Lordship then stated the facts and continued:] The

(1) [1911] 1 Ch. 18, 34, 35.
(2) (1849) 11 Beav. 483.
(3) 45 Ch. D. 458.
(4) 22 Ch. D. 182.
(5) (1881) 50 L. J. (Ch.) 223.

petitioners and certain of the respondents claim that this fund had been conclusively determined by the order of January 15, 1901, to belong to the children of the testator's five daughters, and of his son John Thompson living at the death of the said Cecilia Thompson. On the other hand the three last named respondents, who are the personal representatives of Henry Armstrong, deny that the order in question has any such effect as claimed, and rely on the original absolute title of Ann Ellen Thompson to her share in the testator's residuary estate.

On the conclusion of the arguments at the end of last term I intimated that my decision was in favour of the legal personal representatives of Henry Armstrong, but that in view of the importance of the matter I thought it well to give a considered and written judgment. The decision depends mainly on the answer to two questions, which are not altogether independent of one another. The first is whether the carrying over of funds to a separate account operates as a judgment or declaration of right in favour of the persons indicated as the owners by the title of that account, and conclusively bars the real owner if not so indicated. The second is whether the order of January 15, 1901, was made in excess of the jurisdiction of the Master, particularly if it would have so far reaching an effect as would result from an affirmative answer to the first question.

As regards the first of these questions, some stress was laid for the petitioners on the observations by Lord Langdale in *In re Jervoise* (1) as to the great importance of accuracy in the titles of separate accounts. But when these remarks are carefully examined they do not, in my judgment, carry the petitioners home. It is undoubtedly the case that the carrying over of funds to a separate account in an administration action has at least the prima facie effect of liberating them from the general questions and liabilities in the pending action and of enabling them to be subsequently dealt with in the absence of persons who are not mentioned or indicated by the title of the account, read in the light of the

(1) 12 Beav. 209.

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terms of the will or settlement in course of administration. A wrong or insufficient description in such a title might therefore result in the funds carried to the separate account being subsequently dealt with in the absence, and possibly to the prejudice, of persons who were really concerned. And such a consideration is in itself sufficient to account for the warning of Lord Langdale as to the necessity of accuracy in the framing of the title to such separate accounts. But it is quite another thing to suppose that Lord Langdale implied that the title of a separate account conclusively declared and determined the persons entitled to the funds comprised in that account. Had he had any such proposition in his mind, he would, in my judgment, have enunciated it in much stronger and more definite terms. He was, I think, using language which referred to convenience and accuracy and facility of administration only and was not concerned with definite and conclusive ascertainment and declaration of rights.

The case of *Peareth* v. *Marriott* (1) was also relied on for the petitioners. There an order had been made in chambers and acted on for some time, that an annuity to a wife should be paid subject to income tax, and this order obviously implied a declaration or decision that the annuity was so subject, as indeed the Court of Appeal obviously thought it was. In these circumstances the Court of Appeal, affirming Bacon V.-C., had no difficulty in deciding that the matter was res judicata, and could not be reopened. There had been a decision involving the payment of a smaller annual sum only and negativing the right to a larger annual sum. The order was one deciding rights, not merely facilitating administration.

Again, the case of *Edgar* v. *Plomley* (2) when carefully considered, was one that is rather against than in favour of the claim of the petitioners here. There third parties had acquired rights in reliance on the freedom from outside liabilities indicated by the separate account, and the decision was expressly based on that circumstance. The general trend of the observations in the judgment in that case indicates that

(1) 22 Ch. D. 182. (2) [1900] A. C. 431.

the mere carriage to a separate account does not operate as a res judicata between the original parties.

In re Eyton (1) was to precisely the same effect. There funds had been carried to the separate account of an annuitant with a direction to pay the income to her for life, and she had subsequently charged her interest. Chitty J. held that the title of the chargees prevailed over a claim against the annuitant for breach of trust, but intimated that this claim would have been a good claim against the annuitant herself, and that in that case the money might have been recalled or stopped from the separate account. The remarks in *Cloutte* v. *Storey* (2) recognize and affirm the same principle.

It is not immaterial to observe, as indicating the purely administrative character attached to the carriage of funds to separate accounts, that the length of the title of any such account must not ordinarily exceed thirty-six words; while in the case of many trusts it would certainly be difficult, and might probably be impossible, to frame a title of that length which would describe or define the trusts with complete accuracy. And it may be noticed that in this very case the original order on further consideration framed a title for each of the five separate accounts of the shares of the testator's five daughters, which was inaccurate if considered as a declaration or definition of the trusts on which the shares were respectively held. The title in each case denoted that the testator's daughter took for life. In fact her life interest was in each case subject to a gift over on attempted alienation. But it could not, I think, be seriously suggested that the brevity of the title involved a corresponding enlargement of her interest. In short, the title of an account is for most purposes, at any rate as between the persons originally entitled, a short label for the purpose of convenient subsequent administration.

Next I have to consider whether the order of January 15, 1901, so far as it directed the carrying over of the funds in question to a separate account, was in excess of the jurisdiction of the Master. The funds largely exceeded the sum

(1) 45 Ch. D. 458, 462. (2) [1911] 1 Ch. 18.

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of 1000*l.*, and so could not have been ordered to be paid out on summons under Order LV., r. 2, sub-r. 2, even by an order of the judge in person; and the limitations imposed by this sub-rule would, I think, apply to a summons for transfer of a fund to the credit of a different action. Nor is there any other sub-rule of r. 2 of Order LV. which appears to expressly authorize the making in chambers of such an order as that now in question. It was indeed suggested that the words of sub-r. 18—namely, "Such other matters as the Judge may think fit to dispose of at Chambers"—would authorize the making of the order. And it was pointed out to me that the forms both in the current and the previous editions of Daniell's Chancery Forms include forms of summons for the carrying over to separate accounts of securities exceeding 1000*l.* But though this would indicate that the judge in person might make such an order, it by no means follows that the Master in chambers could or should do so. I have spoken on the point to the Chief Master, who happens also to be the Master who made this particular order, and I understand from him that no general direction has been given by a judge for the making of such orders in chambers, and that it is not his ordinary practice to make such orders, though of course he has no particular recollection of the circumstances attending the making of an order so far back as the year 1901.

These remarks apply to an order for carrying a fund, or at any rate a fund exceeding 1000*l.*, to a separate account, even if such an order is to be regarded merely as one for the convenience of the subsequent administration of the fund. But the objections to such an order are much graver if, as is argued for the petitioners, it amounts to a declaration of right and can be relied on as creating a res judicata. An order with these consequences is obviously one that is not and should not be within the jurisdiction of a Master in Chancery chambers. It is a matter for the judge and for him alone. And in this connection it is not immaterial to observe the language of the first proviso to r. 15 of Order LV. It would be lamentable if a Master could, by carrying a fund to a separate account in favour of one or more persons, effect

indirectly in a pending action the equivalent of what he is expressly forbidden to do in an action commenced by originating summons—that is, put a construction on the language of a document such as the will in this case.

I may add that the case is one in which, had it been necessary, I should have extended the time for appealing from the order made by the Master in chambers so as to set right in the future the obvious error that has been made. I say in the future, because it may well be that leave to appeal would not have been given except on the terms that past payments of income should not be disturbed.

In my judgment, therefore, the destination of the fund standing to the account now in question being that named in the third payment schedule to the petition, is not governed by the terms of the title of the account, but has to be determined in accordance with the original rights of the beneficiaries under the testator's will, and must be paid out to the three last named respondents as the legal personal representatives of the testator's deceased daughter Ann Ellen Thompson. A further question might have arisen as to whether to any and what extent repayment might be demanded by them of the income which has been wrongly paid to the surviving sisters and sister of Ann Ellen Thompson. But the three last named respondents have not pressed any claim in this respect on the terms that they shall receive this fund free of costs, and it is not necessary therefore for me to consider this further question.

Solicitors: *Wrentmore & Son, for Gisby & Son, Ware; Long & Gardiner, for Bradley, Chitty & Scorer, Dover.*

H. C. G.

ASTBURY J.

1923

May 11.

HORNER *v.* WALKER.

[1922. H. 4754.]

Lessor and Lessee—Oral Agreement—Memorandum—Signature—Lessee's Solicitors—Ratification of Authority—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

A prospective lessee having orally agreed to take a lease from a prospective lessor on certain specified terms, a draft lease embodying those terms was approved by their respective solicitors. By arrangement the engrossments of the lease and counterpart were then prepared by the lessee's solicitors, who subsequently wrote to the lessor's solicitor purporting to enclose the engrossment of the lease for his signature, and saying they had written to the lessee and expected to exchange parts shortly.

By mistake the engrossment of the counterpart was enclosed to the lessor's solicitor, and the engrossment of the lease to the lessee, who subsequently delivered it to the lessor's solicitor's messenger in exchange for the engrossment of the counterpart.

Shortly after this the lessee, relying (inter alia) on the Statute of Frauds, repudiated the oral contract:—

Held, that the lessee's solicitors' letter purporting to enclose the engrossment of the lease coupled with that engrossment, subsequently handed over by the lessee in person, constituted a sufficient memorandum of the oral contract, and that the lessor was entitled to specific performance in terms of that engrossment.

WITNESS ACTION.

This was an action by a prospective lessor to enforce specific performance of the prospective lessee's oral contract to take a lease. The parties are hereinafter referred to as the lessor and lessee simpliciter.

On August 1, 1922, the lessee orally offered the lessor's husband, acting as her solicitor and agent, and hereinafter called the lessor's solicitor, to take a five years' lease from August 13 of certain premises belonging to the lessor at a rent of 52*l.* including rates and taxes with an option of renewal for another five years. The lessor's solicitor said he would submit the offer to the lessor, and, if accepted, would send the lessee a draft lease embodying those terms.

On August 2, the lessor having orally accepted the offer, her solicitor sent the lessee a draft lease embodying the terms.

The lessee took the draft lease to his solicitors, suggested certain small alterations, and instructed them to carry out the transaction. On August 11 the lessee's solicitors attended the lessor's solicitor and agreed the draft. As time was pressing they arranged to engross both lease and counterpart.

On August 14 the lessee's solicitors wrote to the lessor's solicitor saying: "We enclose engrossment of lease so that you can obtain the signature of [the lessor] thereto. We have written to [the lessee] and expect to be in a position to exchange parts at an early date."

By the mistake of an office boy the engrossment of the counterpart was in fact enclosed to the lessor's solicitor, and the engrossment of the lease to the lessee.

These documents contained the names of the parties, thereinafter called the lessor and the lessee, and concluded with the clause: "In witness whereof the lessor has to one part of these presents hereunto set her hand and seal and the lessee has to the other or counterpart thereof hereunto set his hand and seal the day and year first herein written." An attestation clause with the name of the lessor filled in was added at the foot of the engrossment of the lease—namely, "Signed sealed and delivered by the said [lessor] in the presence of ." A similar attestation clause with the lessee's name was added to the engrossment of the counterpart.

On discovering the mistake the lessor's solicitor sent a messenger with the engrossment of the counterpart to the lessee's solicitors and asked for the engrossment of the lease. The messenger was sent on to the lessee, who in exchange for the engrossment of the counterpart personally gave him the engrossment of the lease for delivery to the lessor's solicitor with a view to obtaining the lessor's execution thereof.

On August 17 the lessee's solicitors wrote to the lessor's solicitor stating that the lessee did not propose to proceed with the tenancy, owing to the difficulty he had met with in selling his own house.

On December 11 the lessor commenced this action for specific performance.

ASTBURY J. 1923 HORNER v. WALKER.

In addition to denying that there was any firm oral contract, which point failed on the evidence, the lessee relied on the Statute of Frauds.

Mundahl for the lessor. The lessee's solicitors' letter of August 14 coupled with the enclosed engrossment of the counterpart with the lessee's name properly inserted as lessee is a sufficient memorandum signed by the lessee's agents: *Evans* v. *Hoare* (1); *Hucklesby* v. *Hook*. (2)

Assuming however that technically the lessee's solicitors had no authority to sign a memorandum, the defect was cured by what took place subsequently. The engrossment of the lease, with the lessee's name therein as lessee, was handed by the lessee himself to the messenger of the lessor's solicitor in order that the lessor should execute it. That was a ratification, if necessary, of the lessee's solicitors' authority and a personal recognition and adoption of the engrossment as the lessee's own memorandum.

J. E. Harman for the lessee. The lessee's solicitors only had authority to approve the form of the draft and engrossments, not to sign a memorandum: *Smith* v. *Webster*. (3)

[ASTBURY J. Surely they were authorized to send the engrossment to the lessor's solicitor as a memorandum of what the lessee had already agreed.]

They were authorized to send it as a correct form of lease, but not to sign it or anything else as a memorandum of the oral agreement. The solicitors' approval of the form of a document is merely a step in the negotiations: *Brogden* v. *Metropolitan Ry. Co.* (4)

The subsequent delivery of the engrossment of the lease to the lessor's solicitor's messenger carries the matter no further. It was no doubt a recognition that the form was correct, and that the lessee's name was in its proper place. But that is very far short of constituting it a memorandum signed by the lessee or his agents, so as to authenticate the

(1) [1892] 1 Q. B. 593.
(2) [1900] W. N. 45, 48; 82 L. T. 117.
(3) (1876) 3 Ch. D. 49.
(4) (1877) 2 App. Cas. 666, 675.

entire document, which by the final clause "In witness etc." obviously pointed to signature at the foot of the engrossments, and negatived any intention of treating or adopting the names in the body thereof as signatures for any purpose at all.

Mundahl in reply. *Smith* v. *Webster* (1) is completely explained and distinguished in *Daniels* v. *Trefusis*. (2) In any case it does not touch the question of the lessee's personal ratification of his solicitors' acts.

ASTBURY J. [after stating the facts and holding that there was a firm oral contract]: The only question is whether there is a sufficient memorandum of that contract. In my opinion the letter of the lessee's solicitors of August 14 purporting to enclose the engrossment of the lease to the lessor's solicitor, coupled with that engrossment which was subsequently delivered by the lessee in person to the lessor's solicitor's messenger in order to obtain the lessor's signature thereto, constitutes a sufficient memorandum of that oral contract. The lessor is therefore entitled to specific performance in terms of that engrossment.

Solicitors: *Torr & Co., for William Horner, Stockton-on-Tees; Gibson & Weldon, for Archer, Parkin & Townsend, Stockton-on-Tees.*

(1) 3 Ch. D. 49. (2) [1914] 1 Ch. 788, 798.

G. R. A.

P. O. LAWRENCE J.

1923

April 17.

In re PARENT TYRE COMPANY, LIMITED.

[00227 of 1923.]

Company—Memorandum of Association—Alteration of Objects—Extension to new Business—Power of Court—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 9, *sub-s.* 1 (*d*).

The additional business which a company, by an alteration of its objects effected under s. 9, sub-s. 1 (*d*), of the Companies (Consolidation) Act, 1908, is enabled to carry on, may be a business wholly different from and bearing no relation to the then existing business of the company and yet be capable of being conveniently and advantageously combined with it, provided such new business is not destructive of or inconsistent with the existing business.

Whether the proposed new business is one which may be conveniently and advantageously combined with the then existing business of the company is a question for the determination of the company's managers and shareholders.

A company, whose business had ultimately come to consist in the holding and management of large investments in two other companies, on the advice of its directors that the businesses of bankers and financiers might be conveniently and advantageously combined with the then existing business of the company, passed a special resolution by an overwhelming majority of its shareholders to alter the objects clause of its memorandum, so as to enable the company to carry on such new businesses. Upon the petition of the company under s. 9, sub-s. 1 (*d*), of the Act of 1908, the Court confirmed the alteration, notwithstanding the new businesses were wholly different from and bore no relation to the company's then existing business.

THIS was a petition by the company for the confirmation by the Court of a special resolution to extend the objects of the company.

The company was incorporated in 1896, under the name of the "Dunlop Pneumatic Tyre Company, Ld.," and in 1913 changed its name to the "Parent Tyre Company, Ld." The nominal capital of the company was 2,625,000*l.*, of which about four-fifths were issued and fully paid.

The objects of the company, as stated in clause 3 of its Memorandum of Association, were (inter alia):—

"(*a*) to acquire and take over as a going concern the undertaking of the Pneumatic Tyre Company, Ld., and all or any of the assets and liabilities of that company and also certain patents, and with a view thereto, to enter

into and carry into effect with or without modification, the three several agreements in the terms of the drafts referred to in clause 3 of the Articles of Association of the company."

"(*b*) to carry on the business of manufacturers of and dealers in and letters to hire of pneumatic and all other tyres and wheels, of cycles, bicycles, velocipedes, and carriages and vehicles of all kinds, and all machinery, implements . . . . and things capable of being used therewith, ... "

"(*c*) to carry on the business of manufacturers of, dealers in and letters to hire of cycles . . . . and carriages and vehicles of every description, and all component parts thereof respectively, and also all apparatus and implements and things for use in sports and games."

"(*d*) to carry on the business of india-rubber manufacturers and makers of and dealers in articles of any description made or prepared with india-rubber."

"(*f*) to carry on any other business whether manufacturing or otherwise, which may seem to the company capable of being conveniently carried on in connection with the above, or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights."

"(*m*) generally to purchase, take on lease, or in exchange, hire, or otherwise acquire any real and personal property either in the United Kingdom or abroad, and any rights or privileges which the company may think necessary or convenient for the purposes of its business and in particular any land, buildings, easements, machinery, plant and stock-in-trade."

"(*u*) to take or otherwise acquire and hold and deal in shares in any other company having objects altogether or in part similar to those of this company or carrying on any business capable of being conducted so as directly or indirectly to benefit this company. To enter into partnership or co-operate with any person or company carrying on any business which the company is authorized to carry on or which was capable of being conducted so as to benefit the company.

P. O. LAWRENCE J. 1923 PARENT TYRE CO., *In re.*

The company may aid in establishing and supporting associations or institutions calculated to develop taste for use of bicycles or tricycles or any other vehicles or articles in which the company may be interested."

There was no provision in the objects clause of its memorandum authorizing the company to carry on the general business of bankers or financiers.

The company, after its incorporation, except to some slight extent, had never been a manufacturing company. It acquired controlling interests in various other companies situate abroad, which interests were sold prior to 1912. In 1898 the company acquired all the shares in "Byrne Brothers Indiarubber Company, Ld." (now the "Dunlop Rubber Company, Ld."), and up to 1912 sold goods manufactured by that company. That business was given up in 1912, under an arrangement with that company, and since that year the business of the company had taken the form of holding and managing investments principally in the Dunlop Rubber Company, Ld., or its subsidiaries.

The company's assets consisted of investments in shares, bonds and securities valued at 2,530,069*l.* and sundry loans amounting to 65,231*l.*; the principal investments being two millions and more 8 per cent. preference shares of 1*l.* each in the Dunlop Rubber Company and 777,500 7 per cent. preference shares of 1*l.* each in No. 2 D. R. Cotton Mills, Ld.

By a special resolution passed and confirmed at extraordinary general meetings of the company held on February 1 and 20, 1923, respectively it was resolved by an overwhelming majority that the provisions of the memorandum of association of the company with respect to the company's objects be altered by adding after para. (*f*) of clause 3 of the memorandum the following paragraph—namely: (*f.f.*) whether or not in connection with any of the preceding objects, to undertake and/or carry on any business, undertaking, transactions or operation commonly carried on or undertaken by bankers, financiers, financial houses, underwriters, or subscribers of Government or other loans or issues, and to deal in shares, investments, and securities of all kinds and

to give guarantees of every description and to buy, sell, and deal in real and personal estate of every description.

At the first meeting there were present or represented by proxy, shareholders holding between them, approximately, 380,000 preference, 300,000 ordinary, and 200,000 deferred shares who voted for the resolution. One shareholder only, Mr. James Adam, who held only 6077 ordinary shares, voted in person at that meeting against the resolution, and proxies in respect of only 3630 ordinary shares were lodged against the resolution. At the confirmatory meeting the persons present and the proxies lodged in favour of the resolution were not so large in number, but no proxies were lodged and no person voted against it.

The company had ample capital with which to carry on its existing business and also the proposed additional businesses.

The petition prayed that the alteration of the company's objects proposed to be effected by the special resolution might be confirmed by the Court.

The shareholders (including Mr. J. Adam) who opposed the application held between them about 9000 ordinary shares.

It was conceded by the petitioners, at the hearing, that the concluding words of the proposed new paragraph—namely, "and to buy, sell and deal in real and personal estate of every description," were too general, and it was agreed that, with the approval of the Court, those words should be abandoned.

Luxmoore K.C. and *Andrewes-Uthwatt* for the petitioners.

Owen Thompson K.C. and *Romer* for supporting creditors.

Clauson K.C. and *H. C. Marks* for supporting shareholders.

Jenkins K.C. and *Stamp* for dissentient shareholders.

The proposed alteration is outside the purview of s. 9, sub-s. 1 (*d*), of the Act of 1908, and is ultra vires the company. It is too wide and indefinite, especially having regard to the concluding words "and to buy, and sell and deal in real and personal estate of every description." The new clause as it stands would enable the company to embark on almost

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any conceivable undertaking however foreign to its main existing business: see Lord Wrenbury's speech in *Cotman* v. *Brougham*. (1) The businesses of bankers and financiers are not amongst the original objects for which the company was formed. When the dissentient shareholders became members of the company the new businesses, which are proposed, were not at that time authorized or even contemplated objects of the company. It is proposed now that the company should be enabled to carry on an entirely new class of business having no sort of relation to the existing business of the company: the company having certain assets at their disposal desire, in effect, to have power to speculate with them. To that, the dissentient shareholders are entitled to object. The section does not authorize the carrying on of a business of any nature whatever: it must be a cognate business, and not one which bears no relation to the existing business of the company. It would be permissible under the section, for instance, for a motor business to be added to a carriage business or for a life insurance business to be added to a marine insurance business. But the proposed new businesses are entirely foreign, and are not such businesses as may be conveniently and advantageously combined with the company's existing business within the meaning of the section in the Act of 1908.

P. O. LAWRENCE J. The company at the present time owns, as its sole assets, investments in shares, bonds, and securities valued by the directors at more than two and a half million pounds, and certain loans exceeding 65,000*l*. The business now carried on by the company consists in holding and managing those investments. The main investments belonging to the company consist of over 2,000,000 preference shares in the Dunlop Company and over 770,000 preference shares in No. 2 D. R. Cotton Mills: the value of those two blocks of shares being placed at something over 2,400,000*l*.

The directors of the company have come to the conclusion that it is not expedient in the interest of the shareholders

(1) [1918] A. C. 514, 522.

that the fortune of the company should be, to such a large extent, dependent on the fortunes of these two companies, and especially on that of the Dunlop Company; and they have come to the conclusion that, by reason of the business which they are now carrying on, the company is in a position conveniently to undertake the new class of business which is described in the resolution which the company is asking the Court to sanction on the present occasion. The additional businesses which the directors consider can be conveniently and advantageously combined with the business which the company now carries on are the businesses of bankers, financiers, and financial houses, underwriters, or subscribers of Government or other loans or issues and dealings in shares and investments and securities of all kinds and the giving of guarantees of every description. [His Lordship then stated the facts and figures relating to the voting on the special resolution, and after observing that there was an overwhelming majority in favour of the directors' proposal to add to the memorandum of association, continued:]

The point taken by Mr. Jenkins is, first of all, that the proposed additions to the memorandum do not fall within the permitted alterations in s. 9 of the Companies (Consolidation) Act, 1908. The only clause of that section which is material in the present case is clause (*d*) of sub-s. 1. It is contended that the businesses referred to in the special resolution do not fall within the definition of a business which, under existing circumstances, may conveniently or advantageously be combined with the business of the company. It is said that the businesses mentioned in the special resolution form an entirely new departure; that they were not contemplated by the original memorandum, and, further, that they have no relation to any of the businesses described in the present memorandum of association, and that, therefore, they are not businesses which may conveniently or advantageously be combined with the business of the company. There is a further objection taken to the resolution, that the last words of the resolution are too wide and vague —that is to say, the business of "buying, selling and dealing

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in real and personal estate of every description." I will deal, first, with the last objection, which, I think, is in substance a good one. The clause is one which, to my mind, the Court ought to be very reluctant to sanction as an alteration of the memorandum under s. 9. Mr. Jenkins has pointed out that it would include dealing in almost every conceivable real and personal estate, including businesses of a nature altogether foreign to the business described in the memorandum.

That objection, however, was disposed of by my asking whether the petitioners insisted on the retention of those last words, and by Mr. Luxmoore's answer that he was willing to dispense with them. Therefore, I propose to sanction the alteration of the memorandum on condition that those words are omitted.

Dealing now with the main part of the resolution, I have come to the conclusion that, although the businesses there described are, in my opinion, a new departure, in the sense that they do not fall within the memorandum as at present drawn and are businesses which have no definite relation to the present business of the company, yet, in my judgment, this fact is not fatal to the introduction of the additional objects enumerated in the special resolution. The question whether any given additional business is one which may conveniently or advantageously be combined with the business of the company carried on at the time when the special resolution is passed must, in my judgment, be determined by the persons engaged in the business of the company. It is essentially a business proposition, whether an additional business can or cannot be conveniently or advantageously carried on under existing circumstances with the business of the company. The additional business, of course, must not be destructive of or inconsistent with the existing business: it must leave the existing business substantially what it was before; but the additional business may be one which is different from the original business and yet may well be capable of being conveniently and advantageously combined with the business which is being carried on. I think it would

be placing altogether a too narrow construction upon s. 9, to hold that, because the additional business involves a new departure which was not contemplated by the original memorandum, therefore it does not fall within the purview of the section.

In the present case, the evidence has satisfied me that not only the managers of, but also the vast bulk of the shareholders in, the company have come to the conclusion that the businesses now proposed to be carried on are businesses which can conveniently and advantageously be combined with the business of the company, and therefore are businesses which, in my judgment, not being destructive of or inconsistent with the business which the company is now carrying on, may properly be sanctioned by the Court under s. 9, sub-s. 1 (*d*). I propose, accordingly, to make an order confirming the alteration, on condition that the concluding words "and to buy, sell and deal in real and personal estate of every description," are deleted.

As regards the costs of the opponents to the petition, I think that the Court should be reluctant to prevent persons interested from appearing on these occasions. In fact, the advertisements issued invite persons to appear and oppose, if they think fit to do so. Unless the opposition is merely frivolous, I think the Court ought not to penalise shareholders or other interested persons for attending in Court to express their views. Here, Mr. Adam with his family has a very substantial holding in the company. I think his opposition has been useful in preventing the Court—possibly per incuriam —from passing so wide an alteration as is contained in the concluding words of the resolution. Moreover, I think, opposition in these cases is wholesome and ought to be encouraged rather than discouraged. I, therefore, in the exercise of my discretion, order the company to pay the costs of the opponents to this petition.

Solicitors: *Lithgow & Pepper; Guedalla, Jacobson & Spyer.*

H. C. H.

Followed. Re YOUNG (*decd.*). [1950] 2 All E.R. 1245.

ROMER J.

1923

March 22.

In re GARDNER.

HUEY *v.* CUNNINGHAM.

[1922. G. 3077.]

Will—Gift of all real and personal estate to Husband for Life—Signed but unattested Memorandum creating Trust in favour of three named Persons—Death of one of named Persons in Lifetime of Testatrix—No Intestacy.

A testatrix by her will, dated April 23, 1909, bequeathed all her real and personal estate to her husband for his use and benefit during his life, "knowing that he will carry out my wishes." Four days after the date of her will she signed an unattested memorandum expressing her wish that "the money I leave to my husband" should, on his death, be equally divided among certain named beneficiaries. She died in 1919 possessed of personal estate only, and her husband died five days later. After his death his wife's will and the memorandum were found in his safe, and there was parol evidence that shortly after the execution of the will the testatrix had said, in his presence, that her property after his death was to be equally divided between the named beneficiaries, and that he assented thereto. It was held by the Court of Appeal in *In re Gardner* [1920] 2 Ch. 523 that the husband held the corpus, subject to his life interest, as a trustee for the beneficiaries named in the memorandum.

One of the beneficiaries named in the memorandum died in the lifetime of the testatrix, and the question arose whether her share was payable to her legal personal representative or whether the trusts of her share failed:—

Held, that the one-third share of the deceased beneficiary was payable to her legal personal representative, notwithstanding that she predeceased the testatrix.

BY her will dated April 23, 1909, the testatrix gave all her real and personal estate of every description to her husband for his use and benefit during his life, "knowing that he will carry out my wishes." On April 27, 1909, she signed a memorandum stating that her wishes were that "the money I leave to my husband should, on his death, be equally divided among my nieces and nephew, viz., May Cunnington, Mabel Olive Hope Bayly, and Lancelot Brodrick. In the event of May Cunnington not surviving my husband then the money to be divided between M. O. H. Bayly and L. Brodrick in equal parts." This memorandum was not attested. M. O. H. Bayly predeceased the testatrix and

died on October 9, 1917. The testatrix died on April 9, 1919, and her husband on April 14, 1919, without having proved her will. The question was raised whether the memorandum created an absolute trust in favour of M. Cunnington and L. Brodrick, and the Court of Appeal held (*In re Gardner* (1), where the facts of the case are fully reported), reversing a decision of Eve J. (2), that the husband held the corpus, subject to his life interest, as a trustee for the beneficiaries named in the memorandum, and declared that a valid trust was created by the testatrix of her residuary estate after the death of her husband in favour of M. Cunnington, L. Brodrick and M. O. H. Bayly, and that M. Cunnington and L. Brodrick were absolutely entitled to the one-third share each of the residuary estate of the testatrix. The estate of M. O. H. Bayly was not represented at these proceedings, and no order or declaration was made in respect of the one-third share to which she would have been entitled if she had survived the testatrix.

The present summons was taken out by the executors and trustees of the will of the husband and the legal personal representatives of the testatrix, the defendants being the legal personal representative of M. O. H. Bayly and one of the next of kin of the husband, and it asked for the determination of the question whether the one-third share was payable to the legal personal representative of M. O. H. Bayly or whether the trusts of such one-third share failed by reason of the death of M. O. H. Bayly in the lifetime of the testatrix.

H. T. Method for the plaintiffs drew attention to the facts as reported in *In re Gardner*. (1)

Farwell K.C. for the legal personal representative of M. O. H. Bayly. I submit that the legal personal representative of the deceased niece is entitled to the one-third share of the estate of the testatrix. The judgments in the Court of Appeal in *In re Gardner* (1) have, in effect, decided that. The argument accepted by the Court of Appeal was that only a life interest passed by the will of the testatrix, but it

(1) [1920] 2 Ch. 523. (2) [1920] 1 Ch. 501.

ROMER J. 1923 GARDNER, *In re.* HUEY *v.* CUNNINGHAM.

accepted evidence that she had desired her husband to deal with the corpus in a particular way, and that he had agreed to do so, and that, therefore, it would be a fraud on the three named people if he had kept the whole. The whole basis of the decision of the Court of Appeal was that there was a valid trust created by the testatrix in 1909, and that the husband only took under the will as a trustee. The principles that ought to guide the Court in cases of secret trusts are very clearly stated by Lord Hatherley L.C. in *McCormick* v. *Grogan*. (1)

C. D. Myles for the next of kin of the husband. The Court of Appeal in the declaration made in *In re Gardner* (2) carefully refrained from saying that M. O. H. Bayly or her executors were entitled to a one-third share in the estate of the testatrix. The trust in this case must be treated as if it were contained in a testamentary document admitted to probate. That is the effect of the judgment of Cozens-Hardy L.J. in *In re Maddock*. (3) If that proposition is correct, then the doctrine of lapse must apply to this one-third share. In *Cullen* v. *Attorney-General for Ireland* (4), cited in *In re Maddock* (3), the trust was treated as being dehors the will, but that was an entirely different case to the present.

[He also referred to *Wallgrave* v. *Tebbs*. (5)]

Farwell K.C. in reply.

ROMER J. The question raised by this summons is whether persons claiming through the niece who predeceased the testatrix are entitled to a one-third share of the estate of the testatrix. The Court of Appeal in arriving at their decision were acting on a long established principle, that if the owner of property makes a gift of it on the faith of a promise by the donee that he will deal with the property in a particular way, an obligation so to deal with it is placed upon the donee and can be enforced in these Courts if the donee becomes

(1) (1869) L. R. 4 H. L. 82, 88.
(2) [1920] 2 Ch. 523, 535.
(3) [1902] 2 Ch. 220, 231-2.
(4) (1866) L. R. 1 H. L. 190.
(5) (1855) 2 K. & J. 313.

entitled. Most of the cases where the principle has been applied are cases where the gift has been made by a will; but the principle operates whether the gift is made by settlement inter vivos, or by will, or where the owner of property refrains from making a will and so allows the property to pass to the donee as on an intestacy. That being the principle, I cannot see why a trust for the benefit of individuals engrafted upon property given to the donee by a will or by means of an intestacy should be treated as a gift made to those individuals by the will of the donor any more than it should be so treated where the property has been given to the donee by the donor in his lifetime. The principle has nothing to do with the fact that the gift has been made by one method rather than by another. Apart from authority I should without hesitation say that in the present case the husband held the corpus of the property upon trust for the two nieces and the nephew, notwithstanding the fact that the niece predeceased the testatrix. The rights of the parties appear to me to be exactly the same as though the husband, after the memorandum had been communicated to him by the testatrix in the year 1909, had executed a declaration of trust binding himself to hold any property that should come to him upon his wife's partial intestacy upon trust as specified in the memorandum. If I could construe the husband's promise as a promise to give the property on his death to such of the three named persons as should survive the testatrix or to such of them as should survive him, I should decide in Mr. Myles' favour. I cannot however so construe his promise without introducing into the memorandum words that are not there. But Mr. Myles says that the matter is not free from authority, and cites *In re Maddock* (1) in favour of the proposition submitted to me, that in these cases of so-called secret trusts where the property is given by will, then as between the trustee and persons claiming under him, the trust is to be construed and takes effect just as though it had been contained in a testamentary document admitted to probate. In other words that I must in the

(1) [1902] 2 Ch. 220.

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present case, in order to ascertain the persons entitled to benefit, treat the memorandum as if its terms were contained in a codicil. If so, Mabel would not take the one-third share. In the first place, it is to be observed that in the present case the husband succeeded to the corpus by reason of the testatrix having died intestate in respect of it, and did not take it under a will at all. But in any case I do not think that *In re Maddock* (1) is an authority for the proposition in support of which it was cited. In that case the testatrix expressed a wish in a signed memorandum that a specified portion of her residuary estate should be disposed of in favour of third persons by her residuary legatee who was also one of her executors. The question that had to be determined was as to how the debts of the testatrix were to be borne as between the specified part of the residue and the remainder. The Court of Appeal held that the estate was bound so to be administered as to throw the debts on the remainder of the estate. Collins M.R. and Stirling L.J. decided the case on the footing that, looking at all the circumstances, both the testatrix and the residuary legatee must have intended that the latter was, in administering the estate, to give effect to the memorandum, as between herself and the persons named, as if the property had been specifically given by will. But this was merely for the purpose of ascertaining what was the property that was affected by the "secret trust" and not for the purpose of ascertaining the persons to be benefited under such trust. They certainly did not hold that for all purposes the specified part of the property was to be treated as having been given by will upon trust for the named persons. Cozens-Hardy L.J., however, did express himself in a way which gives colour to Mr. Myles' proposition. He says: "In other words, a person to whom the testator's wishes are thus indicated is held, in effect, to contract that, in consideration of the testator giving him the property absolutely, or, if already given to him absolutely, not revoking the gift, he (the legatee) will give effect to the testator's wishes, to the same extent and in the same manner as if those wishes had

(1) [1902] 2 Ch. 220, 231, 232.

been formally expressed in a testamentary document." These are general words, but must I think be read with reference to the particular point which the Lord Justice had to decide. All that he had to consider was whether for the purpose of administration of the estate of the testatrix the particular property mentioned in the memorandum was to be treated as if it had been specifically disposed of by the will or whether as though it formed part of the general residue. I do not think that he intended to lay down any principle applicable to a case such as the one that I have to decide.

I am not sure that the Court of Appeal in *In re Gardner* (1) in making the declaration did not intend to affirm that Miss Bayly became entitled to the one-third share notwithstanding that she predeceased the testatrix. But, whether this be so or not, I am of opinion that, in the events which have happened, the one-third share which would have been payable to Mabel Olive Hope Bayly were she now living is now payable to her legal personal representative, notwithstanding that she predeceased the testatrix, and I will make a declaration accordingly.

Solicitors: *Burgess, Taylor & Tryon; Norman Orfeur, for Cunnington, Son & Orfeur, Braintree; Ernest W. Essell, for C. A. Gardner, Canterbury.*

(1) [1920] 2 Ch. 523.

P. J. B.

ASTBURY J.

1923

May 29, 30, 31.

DODD *v.* AMALGAMATED MARINE WORKERS' UNION.

[1922. D. 552.]

Trade Union—Books and Accounts—Inspection—Employment of Accountant—Proper Case—Bona fides—Onus of Proof—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 14; *Sch. I., cl.* 6.

A member of a trade union who desires to exercise his statutory right of inspecting the books under the Trade Union Act, 1871, s. 14, and Sch. I., cl. 6, may "in proper cases" employ an accountant to assist him.

Norey v. *Keep* [1909] 1 Ch. 561 followed.

The onus of showing that in employing an accountant the member is not acting bona fide lies on the trade union resisting that inspection.

Semble, the onus of showing that the employment of an accountant is reasonably necessary in any particular case lies on the member who desires his assistance.

WITNESS ACTION.

In April, 1922, the defendants dismissed the plaintiff and ten other members of the union from their official positions, their membership being unaffected. An action questioning the validity of this dismissal was started in July and was still pending.

On August 17, 1922, the plaintiff and Williams, another dismissed official, called to inspect the books in exercise of their rights under the Trade Union Act, 1871, s. 14, and Sch. I., cl. 6, and the defendants' rules, made in accordance therewith. They were told that the books were at the auditors' but the auditors' names were refused. At a subsequent interview they were told that the books were in a mess and that certain Australian stock had run out. They only obtained the auditors' names by sending a letter addressed to "The Auditors" which was forwarded by the defendants and replied to by the auditors.

On September 20, after the books had been returned, the plaintiff and Williams were shown some analysis books, but on their attempting to take extracts of the final findings the books were at once removed.

At this time an action by the plaintiff and others

commenced on September 4 for a declaration that the general secretaries were invalidly appointed was pending.

On October 14 the defendants expelled the plaintiff and his colleagues from membership.

On December 4 Sargant J. held that the general secretaries were invalidly appointed.

On December 11 the plaintiff, Williams and others commenced an action for a declaration that their expulsion from membership was invalid. This was not seriously resisted, and on February 23, 1923, on a short cause Astbury J. declared the expulsion invalid.

On March 5, 1923, the plaintiff, who by this time had heard a rumour that the funds had fallen from 100,000*l.* to 67,000*l.* in the course of a year, gave the defendants notice that he would attend on March 7 to inspect the books with a chartered accountant, who would give the defendants an undertaking not to make use of the information acquired except for the purpose of communicating the same to the plaintiff.

On March 7 the plaintiff, Williams and another member attended with the accountant (a non-member), who offered a written undertaking, but inspection was refused on the ground of the accountant's presence.

Later in the day the plaintiff commenced this action for a declaration that he was entitled to inspection by an accountant, on the accountant giving the above undertaking, and for a consequential order.

The defendants alleged that the plaintiff was perfectly competent to inspect by himself, that the employment of an accountant was unnecessary, and that the action was not bona fide but was only brought in the interests of a rival union for the purpose of injuring the defendants.

On March 23, 1923, Astbury J. made an order for inspection on an interlocutory motion.

On April 10 the Court of Appeal discharged the order on the ground that it was contrary to the practice to grant the whole relief in an action on a mere interlocutory motion. (1)

The case now came on for trial.

(1) [1923] W. N. 147.

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Luxmoore K.C. and *Lavington* for the plaintiff. Under the Trade Union Act, 1871, s. 14, and Sch. I., cl. 6, the rules of every registered trade union must contain provisions in respect of (inter alia) "The inspection of the books and names of members of the trade union by every person having an interest in the funds of the trade union."

In pursuance of this statutory enactment, r. 25 provides that "The books and accounts of the Union shall be open to the inspection of any member or person having an interest in the funds of the Union at all reasonable hours at the Head Office of the Union or at any place where the same are kept and it shall be the duty of the Secretaries to produce them."

Apart from some good reason to the contrary the plaintiff has a prima facie right to inspect by an accountant: *Norey* v. *Keep* (1); *Bevan* v. *Webb*. (2) The onus of showing good reason to the contrary lies on the defendants.

A. Grant K.C. and *David White* for the defendants. Though expert assistance is allowed in a "proper case": *Norey* v. *Keep* (3), where the inspection was on behalf of 1300 members, the right to inspect is prima facie personal. This was obviously the view of the Court of Appeal on the interlocutory motion.

There is a two-fold onus on the plaintiff. He must make out that the employment of an accountant is (*a*) necessary and (*b*) bona fide.

As to (*a*): The plaintiff is quite capable of inspecting by himself. Of course, if he is entitled to audit, cadit quæstio. But he does not want an accountant for inspecting books that are already properly audited.

As to (*b*): Where personal inspection is claimed, the motive of exercising that statutory right is perhaps irrelevant, though even in that case the Court would probably not assist a plaintiff against whom mala fides was proved: Buckley on Companies, 9th ed., p. 611, note (*u*).

But inspection by an expert is not a statutory right. It is only allowed in a "proper case." The motive of seeking

(1) [1909] 1 Ch. 561. (2) [1901] 2 Ch. 59.
(3) [1909] 1 Ch. 561, 566.

expert assistance is clearly relevant, and unless bona fides is proved, it will not be allowed.

In the present case the expert's assistance is merely sought in the interests of a rival union.

Luxmoore K.C. in reply. The plaintiff has a prima facie right to inspect by an accountant unless the defendants show good reason to the contrary. They allege that the employment of an accountant is (*a*) unnecessary and (*b*) mala fide. They have failed to prove either (*a*) or (*b*), the onus being on them in each case. On the other hand the plaintiff has proved that the employment of an accountant is (*a*) necessary and (*b*) bona fide, so that if either onus lies on him, he has in fact discharged it.

ASTBURY J. [after stating the nature of the action and referring to the Trade Union Act, 1871, s. 14, and Sch. I., cl. 6 and r. 25]: The plaintiff claims a prima facie right of inspection by a skilled agent and contends that this prima facie right can only be lost by some mala fides or impropriety. He asserts that the onus of proving that his application is mala fide or improper lies on the defendants.

The defendants on the other hand submit that the right is prima facie only personal. They admit that this personal right cannot be lost by the members' motive for desiring inspection, except possibly where real mala fides is proved. Secondly they say that where the member claims to inspect by an expert, mala fides is a complete answer.

They admit that there must obviously be cases where a member must have assistance—e.g., if he be blind or illiterate. But they say that the plaintiff was perfectly able to understand the books himself, and that his object in bringing in an accountant was not bona fide. In other words they contend that this is not a "proper case" for inspection by an expert within *Norey* v. *Keep*. (1) Thirdly they allege mala fides and say that the action is really brought or instigated by a rival union.

There is no real dispute as to the law. In *Norey* v. *Keep* (2)

(1) [1909] 1 Ch. 561, 566.

(2) [1909] 1 Ch. 561, 564-566.

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Parker J. defines the extent of this right of inspection in a manner that nobody has ventured to question. [His Lordship read pp. 564–566 where Parker J., after pointing out that an expert was frequently necessary for a really effective inspection, with which object the right was conferred, declared that the right of inspection was not merely personal, but might "in proper cases" be exercised by an accountant appointed by the persons entitled to inspect. His Lordship continued:]

That is an accurate, lucid, and convincing statement as to the law, and I accept every word of it. The defendants' leading counsel is of the same opinion, but he says the crucial matter is: What is a proper case? I am not going to attempt any general definition to suit all circumstances. I conceive that if it were proved (the onus being on the defendants) that the accountant was being brought in for the purpose of injuring them at the instigation of a rival union the Court would say it was not a proper case to enforce this prima facie right to inspect through an agent.

The only matter I have really to decide is whether the defendants have established that this was not a bona fide application on the plaintiff's part to exercise a right which he clearly had in a proper case, and in his interest as a member and in the interests of the many members who take the same view as to the way the union's funds have been dealt with and its business managed.

In dealing with the appeal from my order on the interlocutory motion Lord Sterndale M.R. said: "The learned judge seems to have thought that *Norey* v. *Keep* (1), a trade union case, and *Bevan* v. *Webb* (2), a partnership case, are authorities for the proposition that in any circumstances any member is entitled to ask the Court to restrain the governing authority of a trade union from preventing him from having inspection by a proper accountant if that accountant gives the union an undertaking not to make use of the information so acquired except for the purpose of communicating the same to the plaintiff"—I will not discuss now whether I thought anything of the kind or not—"It

(1) [1909] 1 Ch. 561. (2) [1901] 2 Ch. 59.

is enough to say that I do not think that those cases decide such a wide and far-reaching point as that. It may be that, if they did, the question of the motive of the person asking to exercise his statutory right might be irrelevant, but I do not think they go as far as that. That is all I propose to say about it. I cannot as to *Bevan* v. *Webb* (1) and I have no wish as to *Norey* v. *Keep* (2) to suggest any doubt as to the correctness of the decisions, but I do think they have been pressed rather further than they will bear pressing by the learned judge. In these circumstances this is not relief that ought to be given on an interlocutory application."

Warrington L.J. said: "As regards the merits, as the matter will have to be tried, I say no more than this—viz., that in my opinion *Norey* v. *Keep* (2), a trade union case, and *Bevan* v. *Webb* (1), a partnership case, both relied on by the plaintiff, do not establish that whatever be the circumstances of the particular case every individual member of a trade union has by law a right to inspect the books by an accountant. They have been pressed as going to that extent, but in my opinion they do not go to the extent to which they have been pressed."

I respectfully agree. The cases merely establish what Parker J. so plainly and clearly laid down, and all I can do is strictly to follow his judgment, qualified, if at all, which I doubt, by the observations of the Court of Appeal.

Before dealing with the facts I may say that though inspection by the accountant was refused on March 7 there is no longer any objection to that inspection now that the balance sheet is out.

[His Lordship then went through the evidence in detail and continued:]

Assuming that the plaintiff's application to see the books on March 7 was honest and bona fide I am of opinion after what I have heard in this case that there was very ample ground for his wish to ascertain by a skilled person the exact position of the union. He had been refused the auditors' names and he had been subsequently refused permission to

(1) [1901] 2 Ch. 59. (2) [1909] 1 Ch. 561.

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take extracts, which refusals following one another might reasonably cause a considerable amount of suspicion in his mind. He had been told that the books were in a mess and that there was something wrong with the Australian stock, and he had ascertained or heard a rumour that the funds had fallen from 100,000*l.* to 67,000*l.* in the course of a year, and unless the defendants have made out that he was acting mala fide or improperly, I think he was amply justified in the demand he made.

[His Lordship then dealt with the evidence as to mala fides and continued :]

I am satisfied that the plaintiff, who gave his evidence perfectly fairly and was a witness of truth, is acting in what he believes to be the best interest of his union, and is in no way an agent or associate of the president of a rival union in the course he has taken. The defendants have failed to satisfy me, and I think the onus is on them, that the plaintiff has been acting mala fide or improperly in desiring this inspection.

The defendants have perfectly properly shown, by putting certain books to the plaintiff, that he is quite capable of understanding the entries therein. He has been for a long time a trade union official, and I think a large number of the matters which he desires to see from the books are matters which, if he gets the right book and reads it carefully, he could find out for himself. But that by no means disposes of the case. The union has large funds. On March 7 the plaintiff believed that there were many suspicious circumstances which it was quite impossible for a layman really to clear up from the books. The payment entries would require careful checking with the resolutions authorizing those payments, and care would be necessary to ascertain that those resolutions were passed by proper quorums and by persons entitled to vote. I am far from satisfied that there are not many matters which the plaintiff may fairly as a member of the union desire to ascertain and verify in respect of which it is perfectly reasonable that he should have the assistance of an expert.

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On these grounds I am of opinion that the plaintiff has established the right he seeks to enforce, and I make a declaration accordingly. No order will be necessary. The defendants must pay the costs.

Solicitors: *Frank Daphne; White & Co.*

G. R. A.

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March 22, 23, 26, 27; *April* 11, 12, 17-20, 24-26; *May* 18.

HAVANA CIGAR AND TOBACCO FACTORIES, LIMITED *v.* ODDENINO.

[1922. H. 2852.]

Passing off—"Corona"—Name Distinctive of Brand and Descriptive of Size and Shape—Request for "a Corona cigar"—Obligation of Seller to clear up Ambiguity—Injunction.

Where "Corona," a name distinctive of the brand of a cigar, had also acquired a meaning descriptive of size and shape, irrespective of brand, so that a request for "a Corona cigar" was ambiguous, to comply with that request by supplying a cigar not of the "Corona" brand is actionable at the suit of the owners of the brand, unless it be first ascertained that the customer does not require a cigar of the "Corona," and no other, brand.

WITNESS ACTION.

This was a passing-off action in which the plaintiffs by their statement of claim asked for an injunction against the defendant in the following terms: An injunction to restrain the defendant, his servants, and agents from selling or supplying or offering or exposing for sale or passing off or inducing or enabling others to pass off cigars not of the plaintiffs' manufacture as or for the plaintiffs' "La Corona" brand of cigars by the use of any words consisting of or containing the word "Corona" as a brand name and from selling or supplying in response to orders for "Corona" cigars cigars not of the plaintiffs' manufacture.

The plaintiffs were one of a group of five companies carrying on business in Cuba as manufacturers of Havana cigars. Among the brands of cigars manufactured by the

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plaintiffs there was a brand the full name of which was "La Corona," but this brand was commonly known simply as "Corona," without the "La." For a great number of years this brand name had been in use by the plaintiffs and their predecessors, and there was no dispute that (when used as denoting brand) the words "La Corona" or "Corona" meant cigars of the plaintiffs' manufacture, and it distinguished their cigars from the cigars of all other manufacturers. For many years it had been the habit of cigar manufacturers to attach different names to cigars of different sizes and shapes to indicate the size and shape of the particular cigar of their manufacture which bore that name. These names were known as size names, and they usually appeared prominently on the side or front of the cigar-box, and on the yellow ribbon with which bundles of fifty cigars were enclosed. If one desired accurately to describe a cigar of a particular brand and of a particular size and shape of that brand, one would mention both brand and size name, thus, "La Corona Exceptionales," or "J. S. Murias Exceptionales." Those size names were legion; the same size name was used by many manufacturers, but cigars of different brands which bore the same size name were not necessarily of the same size and shape; thus, La Corona Exceptionales were not of the same size and shape as J. S. Murias Exceptionales. Further, cigars of the same brand and of the same size and shape might bear different size names, and a merchant might have a particular size name reserved for him by the manufacturer.

Some thirty years or so ago the owners of the Corona brand introduced a new size name—namely, "Coronas." Cigars of the Corona brand and of the Corona size and shape were known as "La Corona Coronas," or as "Corona Coronas." This size name was adopted by other manufacturers, and had now for many years been in common use as a size name. The size name did not always figure as "Coronas" in the plural. Used as a size name, the word "Coronas" and "Corona" indicated a cigar of a particular size and shape. According to the evidence of one of the plaintiffs' witnesses,

Mr. Judge, "Corona" as a size name generally meant a cigar 5½ in. long, straight shaped, with a marble top or rounded end. Subject to additions and variations introduced by various witnesses, that was the shape and size of the cigar which was indicated by the use of the word "Corona" as a size name.

But on the other hand cigars of various brands which were in size and shape indistinguishable, or substantially indistinguishable, from the "Corona" size and shape were sold under size names other than "Corona."

In the case of the Flor de Cuba brand, the cigar to which the owners of that brand attached the size name "Corona" was, until recently, a torpedo-shaped cigar, quite different from the usual Corona size or shape, but since August, 1922, the Flor de Cuba cigars imported here with the size name "Corona" conformed to the usual Corona size and shape of cigars. There were, however, still on the market some of the torpedo-shaped Flor de Cuba Coronas imported before August, 1922. Further, there were many size names which contained the word "Corona" (or, more strictly, "Coronas"), with one or more words in addition, such as "Half a Coronas," "Petit Coronas," "Très Petit Coronas," "Coronas Imperiales." As to these the witnesses (with some four or five exceptions) agreed that they did not in any way indicate brand.

On July 25, 1922, four gentlemen lunched at the Imperial Restaurant, of which the defendant was the proprietor. There was no material conflict about what happened. At the close of the meal, what is called "a trap order" was given. One of the party said: "Waiter, bring me some cigars—Coronas." The waiter brought a mahogany box containing cigars of the Corona size and shape. The box was one on which appeared conspicuously the words "Calixto Lopez" in black letters on a square or oblong of ivory set in the lid, both outside and inside. The head waiter said something to the waiter. The waiter took away the box with the cigars in it, and returned with a plate on which there was a bundle of fifty cigars

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tied round with a yellow ribbon. These he placed before the party. There were no rings round the cigars. The actual ribbon was not identified, but it was a ribbon showing both brand and size name, the latter much more prominently than the former. That seemed to be a not uncommon feature of these ribbons, many of which were produced. The waiter was asked: "Are these Coronas?" He replied: "Yes; so were the others, but they had no band." The party, or some of them, looked at the bundle, and saw that the cigars were not of the Corona brand, but of the Partagas brand; they were Partagas Coronas. None of the party was in fact deceived; they did not expect to get cigars of the Corona brand. The order was given to found proceedings against Mr. Oddenino.

Tomlin K.C., *L. B. Sebastian* and *D. N. Pritt* for the plaintiffs. The word "Corona" is a distinctive name indicating a brand. The word is also used as a size name in a number of brands, but apart from that it is not descriptive. Some persons may use "Corona" as a size name when asking for cigars and therefore there may be an ambiguity in the expression "Corona Cigar." Here the defendant claims the right when a customer gives an order which may mean one of two things to supply the customer with the one without making him understand that he may not be getting what he is asking for. It is submitted that, in response to a request for a "Corona Cigar" the defendant is not entitled to supply cigars which are not of the plaintiffs' brand without first clearing up the ambiguity: see *Hendriks* v. *Montagu*. (1)

If the defendant make no attempt to ascertain what is really being asked for and furnishes the customer with the one article of the two he chooses it is a case of passing off: see *Lever Brothers* v. *Masbro' Equitable Pioneers Society*. (2)

Sir Duncan Kerly K.C., *J. W. Beaumont* and *J. A. Burt* for the defendant. It is submitted that "Corona" by itself

(1) (1881) 17 Ch. D. 638, 651. (2) (1912) 29 R. P. C. 225, 232.

means size. No one would ask for a "Corona" size of the "La Corona" brand without adding something to the size name. It is not the law that a man can be restrained from making use of a word as a description because other persons believe it to be distinctive of a particular make of the article. Any ambiguity as to the meaning of "Corona" has been caused by the plaintiffs, who have chosen to use descriptively, as a size name, a word originally distinctive. The plaintiffs say: "'Corona' means brand or size; the public never order by size alone; therefore when the public order they mean brand, and not size."

The evidence shows that the public do, in many cases, order by reference to size only. The word "Corona" may mean brand in a particular context, but it does not always mean brand. Without a context it is not possible to say what is the meaning of the word in the mind of the user. It is submitted that the defendant is entitled to take a name admitted to be descriptive of size in a descriptive sense. There is no case where, when an order was admittedly ambiguous, the Court has restrained a defendant from taking one meaning, provided he honestly takes it. It is not suggested that a man using the word "Corona" intends to exclude "La Corona" cigars, but it is suggested that he does not mean to indicate them exclusively. The defendant says: "When you ask for 'a Corona' I understand you to mean size, and I therefore put before you different brands in that size, and if that is not what you want you can say so." The result of granting the injunction asked for would be to prevent many customers getting what they wanted.

Cur. adv. vult.

May 18. RUSSELL J. [after stating the facts continued:] It has been necessary to make these preliminary observations in order to show how and why the present action was commenced on July 26, 1922, and to explain the position assumed and the contentions put forward by the defendant in defending the action.

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What Mr. Oddenino would have done if he had been left to his own devices I do not know. The cigar manufacturers of Cuba (other than the plaintiffs and their allied companies) took up the cudgels on behalf of Mr. Oddenino, and incidentally on their own behalf as well. There is no disguise about the matter. As regards the costs of the action, the defendant is "protected." That is, in plain words, the action is being defended at the ultimate risk and expense of the persons who have been alluded to as the independent manufacturers. Inasmuch as they are paying the piper, the tune is of their calling; the action is defended for the purpose of establishing a right to supply, in response to a request for "a Corona cigar" (or any similar request so phrased as not to indicate whether the word "Corona" is used in reference to brand or in reference to size and shape), a cigar of any brand, provided it is a cigar of the Corona size and shape.

This is made clear by the evidence of three witnesses, Mr. Padro (the representative here of the Partagas factory), Mr. Arthur Morris (the representative in this country of the Havana Union of Cigar Manufacturers), and the defendant himself. Some answers of Mr. Padro make this position clear. I summarise them from my own notes: "A man may ask for 'a Corona cigar,' meaning a cigar of the Corona brand; he may also mean a cigar of the Corona size irrespective of brand; unless you ascertain more, you cannot ascertain exactly what he wants. I would inquire whether he wanted the brand or the size. The independent factories want to establish in this action that to a person who asks for 'a Corona cigar' a Corona size of any brand may be supplied without asking any question." Mr. Arthur Morris's contention is the same. "So that it really comes to this, that these gentlemen who are defending this action for Mr. Oddenino want to be able, when anybody asks for "a Corona cigar," to fix him with a Corona size cigar of one of these brands without being sure of what it is he really wants." When that passage was read to the defendant in the box, he replied: "I agree with him there."

The first question to consider is what is meant and understood by the public by "a Corona cigar." The actual words used at the defendant's restaurant were "some cigars—Coronas," and "Are these Coronas?" But no harm is done by my using throughout the judgment the words "a Corona cigar," provided that it is understood that the words include all requests for a cigar or cigars by the use of the word "Corona" without any words or context to indicate whether brand or size and shape is alluded to.

Each side called numerous witnesses, who may be divided into three classes: (1.) witnesses in the trade who deal with persons in the trade; (2.) witnesses who deal with the public; (3.) members of the cigar-smoking public. The first class is not, to my mind, of such importance as the other two. Persons in the trade in their dealings inter se know exactly what they want to describe and how to describe it. It is not astonishing, therefore, to find that among such persons both brands and size names are always used in conjunction, unless some particular context renders the use of one or the other superfluous or unnecessary. The other two classes of witnesses are the important ones, for they are in a position to testify by experience to the habits of the public, the phrases used by them in asking for goods, the interpretation put on such phrases by the retailers, and the acceptance or repudiation of such interpretation by the user of the phrases. I have made a careful examination of the evidence. It would be a waste of time to analyse it in detail. It will be sufficient if I state the facts which I find as the result of it. They are as follows: The words "a Corona cigar" originally meant nothing but a cigar of the Corona brand; the use for many years of the words "Coronas" or "Corona" as a size name in various brands has attached to the words "a Corona cigar" a further meaning—namely, a cigar of the size and shape stated by Mr. Judge, but not necessarily of the Corona brand; the words "a Corona cigar" used as a size name denote to many people other features beyond mere shape and size.

To some the words exclude all cigars not made in Havana

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of Havana tobacco. To others the words include all cigars of the particular shape and size, wherever made, and of whatever tobacco made. Substantially all agree that the words involve that the cigar is made of high quality tobacco of the particular brand. This further meaning which the words "a Corona cigar" have acquired is accordingly a descriptive meaning which, however, varies somewhat in the mouths of different speakers; but this element is common to all—namely, a cigar of the shape and size stated by Mr. Judge. This descriptive meaning has not destroyed or supplanted the original meaning. To the majority of people the words "a Corona cigar" mean a cigar of the "La Corona" brand; but there is no doubt that to a large number of persons the words do not indicate brand, but size and shape.

The position is accordingly this: a request for "a Corona cigar" is more usually a request for a cigar of the Corona brand; on the other hand, it may be a request merely for a cigar of a particular size and shape. The request is ambiguous. It is impossible, of course, to assign proportions to the numbers of persons who, by such a request, mean brand, and the number of persons who by such a request mean size and shape; but whether three out of four mean brand, or five out of eight mean brand, the question to be answered is this: May a person, in response to a request for "a Corona cigar," supply a cigar not of the Corona brand without first ascertaining that the customer does not require a cigar of the Corona brand and no other brand? If a person so acts, does he do that which is actionable at the suit of the owners of the Corona brand?

Apart from a decision of the Court of Appeal in relation to this very brand, no authority touching the point was cited, and I know of none. In the case of *Havana Cigar and Tobacco Factories, Ld.* v. *Tiffin* (1905), *Ld.* (1) it was held by the Court of Appeal that it was actionable to supply, in response to a request for "Corona cigars," cigars which were not of the plaintiffs' manufacture, though apparently

(1) (1909) 26 R. P. C. 177, 473.

of Corona size and shape. Warrington J. took the same view, but dismissed the action on other grounds. No evidence, however, had been called by the defendants; and the essential finding of fact in the case was that if a person asks for a Corona cigar he expects to get a cigar of the plaintiffs'. On the evidence before me, I could not so find. While true of the majority, the minority who would mean by the request a cigar of the Corona size and shape is considerable in number.

It is, however, unlawful to pass off A.'s goods for B.'s goods —that is, it is unlawful by conduct or otherwise to represent that goods manufactured by A. are goods manufactured by B. Thus it would be unlawful, in response to a request for a cigar of the Corona brand, to supply, without clear explanation, a cigar of the Partagas brand. The defendant here claims the right to supply a cigar of the Partagas brand in response to every request for "a Corona cigar," provided that the cigar supplied is of the Corona size and shape. On the evidence, this would result, in the majority of cases, in a cigar not of the Corona brand being supplied, without clear explanation, in response to a request which was in fact a request for a cigar of the Corona brand. In the majority of cases the defendant would (if he exercised the right which he claims) be passing off goods not manufactured by the plaintiffs as goods of their manufacture.

In my opinion, the plaintiffs are entitled to an injunction to prevent this; but they are not entitled to claim that orders for "a Corona cigar" can only be properly fulfilled by the supply of a cigar of the Corona brand. The injunction claimed in the pleadings goes too far. The plaintiffs will be sufficiently protected by and will gain no improper or undue advantage from an injunction in the following terms, to which they are entitled—namely, an injunction restraining the defendant, his servants and agents, from selling or supplying in response to any order for "some cigars, Coronas," or "Corona cigars," or "a Corona cigar," or "Coronas," or "a Corona," cigars or a cigar not of the Corona brand unless it be first clearly ascertained that the customer who gives

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the order does not require cigars or a cigar of the Corona brand and no other brand. I grant an injunction in those terms, and I order the defendant to pay the costs of the action.

Before parting with the case, I desire to make it clear that my decision does not involve any moral reflection upon the defendant's conduct in the past. I accept his statement that his personal view (opposed though it is to that of many of his own witnesses) was that the word "Corona" in the phrase "a Corona cigar" referred to size and shape only and not to brand. The evidence in this case has convinced me (and I hope will have convinced the defendant) that his personal view is ill-founded, and that in the majority of cases the word refers to brand only Assuming the defendant to have been so convinced, he would, I hope of his own accord, have altered the practice which prevails in his establishment. In view, however, of the right asserted through him by those who are behind him in the defence of this action, it is necessary that an injunction should be granted in the terms which I have indicated.

Solicitors: *McKenna & Co.; Wedlake, Letts & Birds.*

J. B. B. M.

EVE J.
1923
April 18.

In re WHISTON.

WHISTON *v.* WOOLLEY.

[1922. W. 4046.]

Will—Construction—Gift to Three Children by Name—One Dead at Date of Will—Rule as to Mistake in Number of Legatees—Lapse—General residuary Bequest—Legacies vested at Death of Testator.

A testator made a general bequest of his residuary real and personal estate (except what belonged to his late wife) to trustees upon trust to sell and divide the proceeds amongst his six named children in equal shares, with a direction that the shares were to be vested legacies at his decease. He then directed his trustees to divide the personal estate of his late wife, to which he had become entitled on her death intestate, amongst the three named children by his late wife. One of these three children, P., was dead at the date of the will, his father knowing that he had been reported missing during the war, but refusing to believe in his death:—

Held, that owing to the death of P. before the date of the will his one-third share in the specific property lapsed and fell into the general residue, and did not devolve upon the two children who were alive at the date of the will. The rule as to a testator mistaking the number of a class of legatees discussed and held inapplicable.

In re Sharp [1908] 2 Ch. 190 distinguished.

But *held*, that having regard to the direction that the shares of the general residue were to be vested legacies at the testator's death, the whole residue passed to the five children who survived.

In re Featherstone's Trusts (1882) 22 Ch. D. 111, 121 followed.

ADJOURNED SUMMONS.

By his will dated September 27, 1918, William Harvey Whiston, after directing payment of his debts and making pecuniary and specific bequests, gave all the furniture, plate, linen, china, pictures, and all other his household goods and effects at his dwelling house at Holme Hurst in the county of Derby (except what belonged to his late wife, Mary Elizabeth Whiston), and all his horses, carriages, farming stock, and all his monies, stocks, shares, and securities and all the rest and residue of his personal estate (except such portion as belonged to his said late wife) and his messuage, land and outbuildings known as Holme Hurst, and all the rest and residue of his real estate unto and to the use of his son William Reginald Harvey Whiston, his son Arthur Norton Whiston, and his

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son Philip Selwyn Whiston, and his sister-in-law, Emma Wheeldon, upon trust to sell and convert the same into money, and to pay the clear proceeds amongst all his children, Alice Beatrice Woolley, William Reginald Harvey Whiston, Arthur Norton Whiston, Gladys Mary Osborne, Philip Selwyn Whiston, and George Oswald Whiston, in equal shares and proportions and he declared that the shares to which his said children should be entitled under his will should be vested in them at his decease. And the testator, after reciting that owing to the death of his late wife M. E. Whiston, intestate, he had become entitled to the whole of her personal estate, he directed his trustees to divide certain articles amongst his three children by his late wife—namely, Gladys Mary Osborne, Philip Selwyn Whiston, and George Oswald Whiston, and to sell the stocks, shares, and funds formerly belonging to his late wife, and after paying certain legacies to pay and divide all the rest and residue of the moneys, stocks, shares, and funds unto and equally between Gladys Mary Osborne, Philip Selwyn Whiston, and George Oswald Whiston, in equal shares, and as tenants in common, absolutely. At the date of the will Philip Selwyn Whiston had been reported as missing in the war, but his father declined to believe that he was dead. Subsequently he was reported by the War Office as having been killed in March, 1918, being then a bachelor and intestate. The testator died on March 8, 1922, and his will was proved by the surviving executors on June 2, 1922. The testator left five children surviving—namely, A. B. Woolley, W. R. H. Whiston and A. N. Whiston, being his children by his first wife, and G. M. Osborne and G. O. Whiston, being children by his second wife (Mary Elizabeth Whiston). Various questions were raised by the trustees upon an originating summons, including: (1.) Whether the one-third share of the portions of the testator's estate derived from his second wife and given to P. S. Whiston devolved upon the other two defendants G. M. Osborne and G. O. Whiston in equal shares, or came under the gift of the testator's general residuary estate; and (2.) whether the residuary real and personal estate became divisible in equal

fifth shares between the five children of the testator in the will named who survived him, or whether the one-sixth share given to Philip devolved upon the testator's heir at law, or next of kin as undisposed of.

Lyttelton Chubb for the trustees.

Beebee for G. O. Whiston. The testator thought he had three children by his second wife living when he made his will, but in fact his son Philip was dead at the time. It is not a class gift: he names all the individuals who are to take, but there is a mistake as to the number. According to the rule acted upon in *In re Sharp* (1), where there has been a wrong enumeration of the children intended to take, the Court will disregard the wrong number and insert the correct number. In that case there was a gift of residue to A., B. and to the six children now living of C.; five children of C. were dead at the date of the will and the Court rejected the specified number six on the ground of mistake and held that the survivor took, with the other named persons. It can make no difference in principle that the names of the children are expressly stated as in the present case. I submit that the two surviving children are entitled to the whole of this specifically bequeathed property coming from the testator's second wife. He also referred to *Lord Selsey* v. *Lord Lake.* (2)

Gover K.C. and *Dighton Pollock* for Mrs. Osborne, another daughter in the same interest referred to *In re Dutton.* (3)

Roope Reeve K.C. and *R. H. Hodge* for the first defendant, Alice Beatrice Woolley. There has been a lapse of the one-third share of Philip. The gift was to the three children nominatim. The testator had it in his mind that his son might possibly be dead. The rule as to a mistake in the number of legatees is stated in Hawkins on Wills, 2nd ed., p. 83, but that rule deals with a mere slip or mistake in the number of legatees. Here the rule is excluded, as the particular children are mentioned by name: *Wrightson* v. *Calvert* (4); Jarman on Wills, 6th ed., pp. 1706–1709.

(1) [1908] 2 Ch. 190.
(2) (1839) 1 Beav. 146.
(3) [1893] W. N. 65.
(4) (1860) 1 J. & H. 250.

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[EVE J. Does the mere insertion of the names alter the position ?]

Yes, I submit that it does, and shows that there was no mistake. This is also a case of overstatement of the number of children not an understatement as contemplated by the rule.

[He referred to *Harrison* v. *Harrison* (1); *In re Hull's Estate* (2); *Glanville* v. *Glanville.* (3)]

The dominant intention of the testator was to benefit all his children, and the question is in what form he has done it.

Whinney for the heir at law. *In re Sharp* (4) was different. A mistake was assumed there in the number of the children. Here there was no mistake. The testator had a definite intention of inserting his son P.'s name as taking a share, though he knew that he was reported as missing. Philip's share has therefore lapsed.

EVE J. The first question is whether, in the event which happened, the death of Philip before the date of the will, Philip's share of the residue of the personal estate which came to the testator on the death of his wife intestate and was by him bequeathed nominatim to his three children by his said wife lapsed, or whether, by applying the rule that when a testator intending to benefit a class of legatees misstates their number the Court rejects the specified number on the presumption of mistake, and holds those members of the class who were alive at the date of the will irrespective of whether their number was more or less than the number specified by the testator, I ought to determine that it devolved on the two children who were in fact alive at the date of the will.

At that date (September 27, 1918) Philip, who was on active service, had been reported as missing, but his father refused to believe that he was dead. It was subsequently ascertained that he had been killed in the previous March.

There can be no doubt on perusing the testator's will that

(1) (1829) 1 Russ. & My. 71, 72.
(2) (1855) 21 Beav. 314.
(3) (1863) 33 Beav. 302.
(4) [1908] 2 Ch. 190.

he intended the subject matter of this bequest to go to his children by his late wife, and the evidence proves that at the date of the will he refused to believe them to be less than three in number. But it turns out that he was mistaken in this belief, and the question is whether the position is one to which the rule I have referred can be applied. The rule is thus stated by Mr. Hawkins at p. 83 of the second edition: "Where a gift to children describes them as consisting of a specified number, which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake, and all the children in existence at the date of the will are held entitled: unless it can be inferred who were the particular children intended: *Garvey* v. *Hibbert.* (1)"

In *In re Sharp* (2) the rule was applied in the converse case where, as here, the number of children was less than those specified in the will.

Is there any room for the application of that rule in this case? I think not. Assuming—but not deciding—that the testator's attitude in relation to Philip's continued existence at the date of his will constituted sufficient ground for presuming the mistake on which the rule is founded I am of opinion that its operation is excluded by the clear indication given by the testator of the particular individuals he intended to participate. As will be seen from the statement of the rule which I have already read it does not apply to cases where it can be inferred who were the particular individuals intended, and it has been excluded in cases where identification has been established by reference to place of residence and the like. A fortiori where the individuals are named as in this case. In these circumstances I think the share lapsed and falls into the general residue.

The further question was then argued as to the destination of the one-sixth share of Philip, which had lapsed.

Gover K.C. and *Dighton Pollock* for Mrs. Osborne. The gift of the general residue in the earlier part of the will is,

(1) (1812) 19 Ves. 125. (2) [1908] 2 Ch. 190.

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upon its true construction, a class gift, the wording being different to that in the gift of the specific property. The gift is to the children in equal shares and proportions with a direction that the share of each of such children shall be vested in them at his decease. *In re Featherstone's Trusts* (1) is a direct authority on this point, there being a similar direction as to the vesting of the legacies there given.

Roope Reeve K.C. and *R. H. Hodge* for Mrs. Woolley.

Whinney for the heir at law. There is sufficient in this will to negative the idea that it is a vested interest.

EVE J. Philip's one-sixth of the residuary estate was undisposed of and should be divided amongst the five residuary legatees who survived the testator. I fortunately have the decision of Kay J. in *In re Featherstone's Trusts* (1) to guide me. He there held that the effect of a direction similar to the one we have here at the end of the residuary bequest that the shares of the residue were to be vested legacies at the testator's death was to avoid an intestacy and to indicate the testator's intention to give the residue to such only of the residuary legatees as should be living at his death. The whole residue accordingly goes to the five children who survived.

Solicitors: *Greenfield & Cracknall, for Whiston & Sons, Derby; Peacock & Goddard, for Moody & Woolley, Derby; Maude & Tunnicliffe, for Taylor, Simpson & Mosley, Derby.*

(1) 22 Ch. D. 111, 121.

G. M.

EVE J.
1923
June 1.

In re HILL.

PUBLIC TRUSTEE *v.* O'DONNELL.

[1923. H. 1304.]

Will—Construction—Bequest to Legatees "for the benefit of themselves and their respective families"—Absolute Interest.

A testator bequeathed the residue of his personal estate in equal shares to his five named brothers and sisters "for the benefit of themselves and their respective families." Two of the legatees had children, another predeceased the testator leaving children, and another was a spinster:—

Held, that it was a bequest to the legatees absolutely, and not as trustees for their children.

Lambe v. *Eames* (1871) L. R. 6 Ch. 597 followed.

Armstrong v. *Armstrong* (1869) L. R. 7 Eq. 518 discussed.

ADJOURNED SUMMONS.

By his will dated September 2, 1913, the testator Luke Mullock Hill, who was a retired West Indian civil engineer, devised and bequeathed the whole of his property and effects as therein directed, after payment of debts. By clause 3 he bequeathed a life interest in a moiety of his estate to his wife, Sarah Caroline Hill, subject to the immediate payment of four legacies of sums amounting to 600*l.* (which included a sum of 400*l.* to his sister, Matilda Hill). By clause 4, in the event of his wife predeceasing him (which happened), he devised and bequeathed the whole of his property, after payment of funeral expenses and debts, as follows: 600*l.* as mentioned in clause 3, further legacies of 250*l.* each to two friends, and certain specific personal articles to his nephew, William McCrory Hill, in affectionate recognition of him as the "present head of my family." By clause 5 the testator bequeathed the residue of his estate "in equal shares to my brothers and sisters for the benefit of themselves and their respective families, as follows: (*a*) Martha Hill, born McCrory, widow of my eldest brother, George Worrall Hill, presently residing in Kansas City, Mo., United States of America; (*b*) Bessie O'Donnell, born Hill, widow of John O'Donnell, deceased, presently residing at Ellsworth, Kansas, United

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States of America; (*c*) Thomas Rowland Hill and his wife Emily, born McKiernan of Woodlands, Tarbert, Co. Kerry; (*d*) Mary McCrory, born Hill, wife of John Armstrong McCrory, presently residing at Seattle, Washington, United States of America; (*e*) Matilda Hill, spinster, of Tarbert, Co. Kerry, Ireland. This share in the residue to be in addition to the specific bequest of 400*l.* made to her under clause 3." By clause 6, in the event of his wife predeceasing him, he appointed the Public Trustee sole executor of his will. The testator's wife died on April 5, 1920, and the testator died on September 25, 1921, domiciled in England. The will was proved on December 6, 1921. The testator left no real estate and his personal estate in the United Kingdom was valued for probate at 6763*l.* 15*s.* 1*d.* The testator had no brother or sister other than the two brothers and three sisters mentioned in clause 5 of the will. George Worrall Hill was married once only, and died on July 4, 1894. His wife Martha Hill predeceased the testator and died on February 7, 1920, leaving six children, one being a defendant, and all had attained twenty-one. The first defendant, Elizabeth O'Donnell, widow, had been married once only, and had ten children, all of whom had attained twenty-one. The defendant, Thomas Rowland Hill, was married, but had no child. The defendant, Mary McCrory, had four children. The defendant, Matilda Hill, had never been married.

The Public Trustee took out an originating summons that it might be determined whether, on the true construction of the will, the residue was bequeathed in equal one-fifth shares to the five brothers and sisters absolutely, or whether the residue was bequeathed upon any and what trusts; and whether the one-fifth share of Martha Hill lapsed by reason of her death in the testator's lifetime, and devolved on the testator's next of kin. The last three defendants were sons of the primary legatees and represented all the children of brothers and sisters of the testator.

Stafford Crossman for the Public Trustee.

E. G. Eardley-Wilmot for children of the primary legatees

was called on to argue first. The question is what is meant by the word "family." In Jarman on Wills, 6th ed., p. 1586, it is stated not to be a technical word, but one of flexible meaning, and three different senses are mentioned in which the word may be used. In one sense it includes "children" only. I submit that is the primary meaning of "family." The parents and the children can either take concurrently as tenants in common or as joint tenants, or the parents take life interests with remainder to their children. In *Armstrong* v. *Armstrong* (1), where there was a gift to a wife absolutely for the benefit of herself and children, it was taken for granted that a trust was created, and the whole argument was whether the estate taken by the widow and children was a joint tenancy or a tenancy in common. James V.-C. was inclined strongly to the opinion that there was a gift for life to the wife with remainder to the children, but it was unnecessary in that case to decide this point. In other cases where similar gifts were made to a legatee "for her own use and benefit and that of our daughter," or "for herself and children" or "towards her support and her family," it was held that a trust was created and the legatee did not take an absolute interest: *Bibby* v. *Thompson* (2); *Crockett* v. *Crockett* (3); *Woods* v. *Woods* (4); *Raikes* v. *Ward.* (5)

A case against my contention is *Lambe* v. *Eames* (6), where there was a gift to a widow absolutely to be at her disposal in any way she might think best "for the benefit of herself and family," and it was held that no trust was intended; most of the older cases were there discussed and criticised. If the testator had intended in the present case to give the legacy to the legatees absolutely he would have said "for their own benefit"; when he says for the benefit of themselves and their families, he intends the children to benefit also and the gift not to be absolute. One of the legatees predeceased the testator leaving children, and if there is a lapse of that share the six children in the family of that legatee

(1) L. R. 7 Eq. 518.
(2) (1863) 32 Beav. 646.
(3) (1848) 2 Ph. 553.
(4) (1836) 1 My. & Cr. 401.
(5) (1842) 1 Hare, 445.
(6) L. R. 6 Ch. 597, 599.

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will be cut out altogether. The decision of James V.-C. (1), I submit, governs the present case, and the legatees take life interests with remainder to their children.

[He also referred to Hawkins on Wills, 2nd ed., p. 204.]

Henry Johnston for the primary legatees. There is an absolute gift to the five persons named in the will as residuary legatees. The added words as to the gifts being for the benefit of themselves and their families only express the motive of the gift, and are in such vague terms that it is impossible to say there is a trust created. It is suggested that "family" means "children," but there is nothing in the nature of a trust declared for them. The Public Trustee is appointed executor only and not trustee. There is therefore no sufficient language here to constitute a trust precatory or otherwise, and the current of the older decisions as to inferring a trust has changed. In *Thorp* v. *Owen* (2), where a testator gave all his estate to his wife during her life, that she might support herself and her children, it was held that no trust was created and the widow took an absolute interest for her life. *Lambe* v. *Eames* (3) governs the present case. The objects of a trust must be pointed out and also the extent of the interest which is given: the onus is on the beneficiaries claiming to be cestuis que trust to establish the trust: *Hill* v. *Hill* (4); *In re Hamilton.* (5) Here the "family" is undefined, ambiguous and vague; there are no details whatever of the interests to be given, and the legatees have not all got families. There is a lapse of the share given to Martha Hill, and that share devolves as on an intestacy.

Eardley-Wilmot in reply.

EVE J. This summons raises the question whether the testator's residuary estate is bequeathed in equal fifths to the five named beneficiaries absolutely or upon any and what trusts. On first reading the gift I formed a strong opinion that it was impossible to spell out any trust from the

(1) L. R. 7 Eq. 518.
(2) (1843) 2 Hare, 607.
(3) L. R. 6 Ch. 597.
(4) [1897] 1 Q. B. 483.
(5) [1895] 2 Ch. 370.

language used. The gift is in these terms. [His Lordship read the gift.] It comes at the end of a will in which there is no mention of any trust nor any indication that the testator contemplated any settlement or any disposition inconsistent with an immediate distribution of his property, and the Public Trustee is named as executor only. If these residuary legatees are trustees, who are their cestuis que trust, and what are the trusts? Does each brother and sister take as a joint tenant with his or her family? If not, where is there any indication of an intention to give any cestui que trust a more restricted interest than the others? Who constitute the families? If it is said "the children of the named legatees" what interest, if any, do the children of the legatee who predeceased the testator take and what, if any, trusts affect the share of the elderly spinster sister?

These and other like considerations compel me to the conclusion that the testator never intended by this vague and uncertain language to create any trust, and that the words on which reliance is placed must be read as expressing the motive and purpose of the gifts and not as cutting down the extent of the interest of the legatee. It is almost incredible that the testator should have contemplated by these words the creation of five separate trusts with a separate trustee and a different set of cestuis que trust in each case.

But my attention has been drawn to several cases wherein the Court has construed language very similar to this as sufficient to impress the subject of the gift with a trust, and in particular *Armstrong* v. *Armstrong* (1) was relied upon. In that case where there was an absolute gift to the widow "for the benefit of herself and children" James V.-C. held that the widow and children took as joint tenants, a decision which was of course arrived at on the footing that there was a trust created by the expression "for the benefit of herself and children," words not very unlike those I have to construe here. But had it been necessary I do not think it would have been difficult to indicate sufficient distinctions between this and the older cases, including *Armstrong* v. *Armstrong* (1),

(1) L. R. 7 Eq. 518.

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to justify the construction which, apart from authority, I have placed upon this will, and to that construction I adhere, notwithstanding the authorities produced. I do so the more readily because the Vice-Chancellor, after he had become a Lord Justice, in deciding in *Lambe* v. *Eames* (1) that an absolute gift to a widow made, it is true, in emphatic terms but followed by the words "for the benefit of herself and family" created no trust, expressed himself in language which I most respectfully think would be peculiarly apposite if I felt myself constrained to adopt in this case the construction arrived at in some of the earlier cases. He says: "The question is, whether those words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed."

I think, since these observations were made, the current of authority has set in a different direction and the Court to-day is not too astute to construe an expression of motive as an intention to create a trust. The four legatees who survived the testator take their four fifths absolutely. The remaining fifth in the circumstances is undisposed of.

Solicitors for all parties: *Andrew, Wood, Purves & Sutton, for Rickerby, Thompson & Yeaman, Cheltenham.*

(1) L. R. 6 Ch. 597, 599.

G. M.

Distinguished. *Re* BLATHWAYT'S WILL TRUSTS. [1950] 1 All E.R. 582.

In re BROOKE.

BROOKE *v.* DICKSON.

C. A.
1923
April 25, 27, 30.

[1922. B. 1908.]

Will—Construction—Limitations in strict settlement—Limitations, whether legal or equitable—Death of first Tenant for Life—First Tenant in Tail not yet in esse—Acceleration of second Life Estate.

Testator by his will, after providing for his elder son, R., by giving him an annuity of 400*l.* "issuing out of my estate," gave, devised and appointed his freeholds, copyholds, and leaseholds to his trustees, their heirs and assigns, to hold the same unto those trustees, their heirs and assigns for ever, but nevertheless to the uses, upon the trusts, and for the ends, intents, and purposes and with, under, and subject to the powers, provisos, declarations, and dispositions thereinafter declared and contained of and concerning the same, that was to say, to the use of the trustees, their executors, administrators, and assigns for a term of ninety-nine years and, from and immediately after the expiration or other sooner determination of the term and in the meantime subject thereto and the trusts thereof, to the use of his younger son, E., for life, and from and after his decease to the use of his first and other sons successively in tail male, and in default or on failure of such issue to the use of R.'s first and other sons successively in tail male, and in default or on failure of such issue to the use of the trustees, their executors, administrators, and assigns during the life of his daughter, C., upon trusts for her benefit during her life. The will contained a management clause which empowered the trustees, so long as the rules of law and equity permitted, to manage the real estate and to receive the rents and profits thereof, and thereout to pay and discharge the expenses of management and repairs, and to pay the balance of the rents to the person for the time being entitled thereto. The testator died in 1888. E. died in 1921, a bachelor. R. was living, but had no son.

On an application by C. for payment to her of the balance of the rents and profits:—

Held, on construction of the will as a whole, that the trustees took the legal estate in fee and that the limitations to the beneficiaries following the limitation to the trustees were equitable.

Held, therefore, that the vested interest of C. took effect at once, but without prejudice to the estate in tail male of any son of R. in case such son should be born.

In re Conyngham [1921] 1 Ch. 491 applied.

Decision in *In re Scott* [1911] 2 Ch. 374 questioned by Younger L.J.

Decision of Russell J. [1923] 1 Ch. 360 reversed.

APPEAL from the decision of Russell J. (1)

Francis Capper Brooke by his will dated October 28, 1885, after providing for his elder son, Reginald, by giving him

(1) [1923] 1 Ch. 360.

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an annuity of 400*l.* "issuing out of my estate," gave, devised and appointed his freeholds, copyholds, and leaseholds to his trustees, their heirs and assigns, to hold the same unto those trustees, their heirs and assigns for ever, but nevertheless to the uses, upon the trusts, and for the ends, intents and purposes, and with, under, and subject to the powers, provisos, declarations, and dispositions thereinafter declared and contained of and concerning the same, that was to say, to the use of the trustees, their executors, administrators, and assigns for a term of ninety-nine years and, from and immediately after the expiration or other sooner determination of the term and in the meantime subject thereto and the trusts thereof, to the use of his younger son, Edward, for life, and from and after Edward's decease to the use of Edward's first and other sons successively in tail male, and in default or failure of such issue to the use of Reginald's first and other sons successively in tail male, and in default or failure of such issue to the use of the trustees, their executors, administrators, and assigns during the life of his daughter Constance upon trusts for her benefit during her life, and after her decease upon similar trusts for the benefit of his daughter Florence. This limitation to Florence for life was followed by a limitation to the person who at the time of the testator's decease should be ascertained by the trustees to be the heir male of the body of one Sir Thomas Brooke who died in 1418 and the issue male of such person. And the testator declared "that in case the person who at the time of my decease shall be the heir male of the body of the said Sir Thomas Brooke and the issue male of such person shall for the period of five years after the decease of all my said children (entitled in priority to such last-mentioned heir male) without issue inheritable as aforesaid or next after the subsequent failure of such issue, neglect to make such claims as aforesaid then and in such case all and every the trusts and provisions hereinbefore declared and contained in favour and for the benefit of such heir male of the body of the said Sir Thomas Brooke and the issue of such person shall from and immediately after the expiration of the said

period of five years be absolutely void and of no effect." And the testator further directed "that after the decease of all my said children (entitled in priority to such last-mentioned heir) without leaving issue inheritable as aforesaid or the subsequent failure of such issue in the meantime until the person who at the time of my decease shall be the heir male of the body of the said Sir Thomas Brooke or the issue male of such person shall establish such claim as aforesaid to the satisfaction of my said trustees in manner aforesaid the rents and profits of the said manors and hereditaments shall be paid to or received and enjoyed by the person or persons who for the time being would be entitled thereto under the trusts of this my will in case there was no heir male of the body of the said Sir Thomas Brooke nor any issue male of such heir male living." Then followed a further series of limitations and finally a limitation "to the use of my right heirs their heirs and assigns for ever." These limitations were followed by a clause in the following terms: "And for the purpose of protecting the contingent uses and estates hereinbefore created I devise and appoint the hereditaments hereinbefore limited to any person during his natural life immediately after the determination of the estate by forfeiture or otherwise unto the use of my said trustees . . . . their executors administrators and assigns during the natural life of the person whose estate shall so determine in trust for him and by the usual means to protect the contingent estates expectant or depending thereupon."

The will contained a management clause in the following terms: "Provided also and I hereby declare that so long as the rules of law and equity will permit my said real estate shall be managed and the rents and profits thereof and also the dividends interest and income arising from my residuary personal estate shall be received and all arrangements and accounts with tenants and occupiers and other persons shall be made and settled by my trustees or trustee for the time being who shall pay out of such rents and profits dividends interest and income in the first place all expenses attending the collecting of rents repairs

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outgoings insurance against loss by fire and particularly the expense of keeping my fire engine and gear at my mansion at Ufford in perfect order and paying four men (one head man and three under him properly drilled if and when required) for such purpose and for attending as firemen if and whenever required (And I direct that my standing orders with respect to the use and employment of my engine shall be strictly adhered to) and all other expenses whatsoever attending and incidental to the management of my said estates and property also paying all annuities and other charges which for the time being may be charged thereon Also the expense of keeping in good repair and order (which I direct my trustees or trustee to do) all brasses monuments and tombs relating to my family and the Cobham family and their alliances in the churches and churchyards of the following parishes namely Athelington in Suffolk Crishall in Essex Cobham in Kent Cowling in Kent Hever in Kent Hoo in Kent Lingfield in Surrey Shorne in Kent Thorcombe in Dorset Ufford in Suffolk Yoxford in Suffolk and Westminster Abbey And shall pay the balance of such rents and profits to the person for the time being entitled thereto under this my will if he or she shall be of full age."

The testator died on January 13, 1888.

Edward Brooke died on April 25, 1921, a bachelor.

Reginald Brooke was still alive, aged sixty-seven. He was married but had no son.

This summons was taken out by the plaintiff, Constance Brooke, for the determination (inter alia) of the question whether upon the true construction of the said will and in the events which had happened (*a*) the clear residue of the rents and profits of all the hereditaments and real estate now subject to the trusts of the will (after payment and discharge of the expenses of management and other expenses as therein mentioned) were now payable to the plaintiff during her life or during some other and what period; or (*b*) whether there was an intestacy as to such rents and profits during the life of the defendant Reginald Brooke so long as he had no son or during some other and what period.

Russell J. held that the uses devised to the beneficiaries were legal uses, and, following with reluctance *In re Scott* (1), that the estate pur autre vie of the trustees was not accelerated so as to take effect from the death of Edward, subject to its being afterwards determined by the birth of a son to Reginald, and that there was therefore an intestacy as to the rents and profits during the life of Reginald so long as he had no son.

The plaintiff appealed. The appeal was heard on April 25, 27, 30, 1923.

Preston K.C. and *Buckmaster* for the appellant.

Romer for the respondent Florence.

G. B. Hurst K.C. and *R. H. Hodge* for the respondent Reginald, the testator's heir.

J. I. Stirling for the respondent trustees.

The arguments were substantially the same as those used in the Court below. The following additional authorities were referred to: *Bagshaw* v. *Spencer* (2); *Richardson* v. *Harrison* (3); *White* v. *Summers* (4); *Lewis Bowles's Case* (5); Fearne on Contingent Remainders, 10th ed., vol. i., p. 223; Challis's Real Property, 3rd ed., pp. 87, 138.

LORD STERNDALE M.R. This is an appeal from Russell J. which raises a good many quite difficult and interesting questions. But at the bottom of them is this question: whether the limitations to the persons mentioned in succession in the will are legal or equitable, and whether those persons take legal or equitable estates. That of course involves the question of whether or not the trustees under the devise to them in the first instance take the legal estate. If they take the legal estate then the subsequent limitations are equitable. If they do not then the will must be so interpreted as to make the limitations legal limitations. Russell J. has held that the trustees do not take the legal estate and that therefore the limitations are legal limitations;

(1) [1911] 2 Ch. 374.
(2) (1748) 1 Ves. Sen. 142.
(3) (1885) 16 Q. B. D. 85.
(4) [1908] 2 Ch. 256.
(5) (1615) 11 Rep. 79b; Tudor L. C. Real Property, 4th ed., 86.

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and whether that be correct or not lies at the root of all the discussion in this case.

I regret to say that I do not take the same view as Russell J. did on that point. I think that the interest given to the trustees is a legal interest; therefore the interesting questions that would arise if I agreed with him as to that do not arise for my decision. *In re Scott* (1) must therefore still await its final vindication or the reverse; and I hope when that moment arrives that it may not be my fate to have to decide it.

I take the statement of the will from the judgment of Russell J. [His Lordship read the learned judge's statement of the limitations to the trustees and the testator's children and issue, the state of his family at his death, and the following statement showing how the question on the summons arose:] "The limitations in favour of Edward Brooke's sons accordingly failed; and there was not on the death of Edward Brooke and is not at present any person in existence capable of taking under the limitations in favour of the sons of Reginald Brooke, which precede the limitation to the trustees during the life of Constance Brooke, who is alive. The question thus arises whether this latter limitation is accelerated so as to entitle the plaintiff (Constance Brooke) to receive the clear residue of the rents and profits, or whether there is an intestacy as to such rents and profits, in respect of a period commencing with the death of Edward Brooke and ending either with the birth of a son of Reginald Brooke, if one be born to him, or with the death of Reginald Brooke, if no son be born to him."

The will is one on which it is not very easy to form a settled opinion. It is inconsistent with itself in many parts. It seems to be made by taking a number of precedents and putting them together without considering whether they would fit or not—and they do not fit. Therefore it becomes difficult to be certain as to the proper construction of the will. From the devise that I have read it will be seen that standing by itself it creates legal limitations in the persons to whom the estate is limited; and the question

(1) [1911] 2 Ch. 374.

arises whether, reading that devise and the other provisions together, the proper construction of the whole will is or is not that it creates legal limitations in the remaindermen, or whether it gives a legal estate to the trustees. The will must be looked at as a whole. Mr. Hurst in his excellent argument, none the less excellent for being concise, told us that we must not interfere with such a prima facie intention as appears in the devise unless we are compelled to do so, and he cited *Cunliffe* v. *Brancker* (1), a decision of Jessel M.R., to that effect. I do not myself derive a great deal of help from such words as " being compelled." There is no external compulsion, and the compulsion must come from the judge's own mind. I think it only means that such a prima facie intention, as it is called, must not be lightly interfered with : that the judge must not lightly give a different meaning to the will but must find something strong enough to oblige his mind to do so. But after all it has to be what the judge thinks does oblige him to do so. The appellant says that there are provisions sufficiently controlling the devise to the trustees—or shall I say not controlling but indicating, when read with the devise, that the will looked at as a whole ought to be construed as giving the trustees the legal estate.

The principles upon which I think we have to act are to be found in the judgment of James L.J. in the case of *Cunliffe* v. *Brancker* (2) : " But it was contended, and truly, that, notwithstanding these apparently clear indications of intention that the successive beneficial devisees should have the legal estate in them, the rest of the will might still show so clearly a contrary intention that the fee should be in the trustees, that there were purposes to be effected, trusts to be executed, duties to be performed so requiring them to have the fee, that we should reject the formal limitations as the mere blundering of the draftsman, just as if they were, as they often are, found in the wills of testators who had themselves nothing but an equitable estate or a long term of years to deal with."

(1) (1876) 3 Ch. D. 393, 404. (2) 3 Ch. D. 393, 408.

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Those are the principles which we have to apply. It was said that this case was really governed by *Berry* v. *Berry*. (1) I think that Mr. Hurst did show that there was sufficient distinction between the documents in the two cases to prevent that case being an authority, and for this reason: that in that case there was no direct power given to the trustees to receive the rents as there was in the clause in this will, to which I shall have to refer in a moment. There was only a direction to them to apply: they naturally could not apply unless they received; and therefore there was by implication a necessity for them to receive the rents. And if it was asked where did they get the power to receive, it could only be found in the devise to them, therefore it was said that that devise must be construed as giving them the legal estate, otherwise they would not have the right to receive. That argument does not apply to this case, because there is in the clause which I shall read in a moment express power given to receive the rents as well as to apply them; therefore, the reasoning of that case, it seems to me, does not apply to this, and it cannot be said that it is a direct authority. But still we have to apply the principles which I have read from the judgment of James L.J. The clause in this will, which counsel for the appellant here rightly describes as his sheet anchor, is the following: [His Lordship read the management clause above set out and continued:]

As I say, if there were not there the expression "to receive" this case would be brought exactly within the authorities to which I have referred. By applying the principles laid down in the judgment of James L.J., it seems to me that here there are duties to be fulfilled and powers to be exercised by the trustees which, unless the express power to receive prevents the operation of this reasoning, require that the trustees should have the legal estate. The suggestion is that the express power to receive prevents a necessity of the trustees, in order to carry out those duties, having the legal estate, because it is a power to receive, as it were, as estate agents, a power to receive as an agent for the

(1) (1878) 7 Ch. D. 657.

purpose of doing these things, and as agents, I suppose, for each successive remainderman, as he takes the legal estate. That seems to me to be a remarkable and unnatural meaning and one which would involve imposing agents on each remainderman as he took the estate whether he liked it or not. A much more natural construction is that the power to receive is given because it arises from the trustees having the legal estate.

But this clause does not stand quite alone. In a certain event the person beneficially entitled was the heir male of the body of Sir Thomas Brooke, Knight, formerly of Holditch Court, who died about the year 1418 and was buried in Thorncombe Church, and it naturally occurred to the testator that there might be some little difficulty and possibly delay in finding the right heir male of the body of a person who died in 1418. He therefore provided that there should be a period of five years given when that contingency arose to find this right heir. Then he went on to provide for what was to be done during the five years, supposing the right heir of Sir Thomas Brooke was not found at the beginning of it. [His Lordship read the clause providing for the receipt of the rents and profits by the person entitled at the expiration of the period above set out and continued :] There is also a power given to the trustees with regard to the annuity to Reginald Brooke. He was given an annuity of 400*l.* : but from that, if he did not pay off a certain debt which he owed to the testator, there was to be deducted the sum of 50*l.* per annum, and the trustees were given power to deduct this 50*l.* I do not know that that carries the matter very much further than the clause of management that I have read, because if they had power to receive under the management clause they would have the power to deduct under this clause as to the annuity. But it does point, I think, to the intention of the testator that the trustees should be in such a position that they could deduct, and if they could deduct they must have been in a position to receive. There are also certain expressions scattered about the will such as " the trusts of this my will " and " the persons beneficially entitled " and so

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on ; and it is the fact that in devising the realty the freeholds and copyholds were mixed up together. I do not attach very much importance to the language such as " the trusts " and " the persons beneficially entitled," because the will is so contradictory to itself in a number of parts that it is difficult to lay very much stress on any particular expression. There are clauses pointing the other way. The devise of the term of ninety-nine years to the trustees that I have already read seems somewhat inconsistent with the legal estate being in them. There is the form of the power of sale and provisions as to the daughters living in the mansion house and no such provisions in the case of sons. These matters are more fully dealt with in the judgment of Russell J., and I do not think it necessary to repeat the considerations upon them. But I certainly agree with him that they do point against the conclusion which I think is the right one. There is also a provision for the trustees having access to the mansion house. There is also the trust of the term created to preserve contingent remainders. I quite agree that you do find these clauses pointing strongly in the direction in which Russell J. decided and against the direction in which I think I ought to decide. But on the whole I think that the clauses that point towards the trustees having the legal estate are sufficient, I will not say to control, but to show that the intention of the testator was that they should have that legal estate.

I come to that conclusion, as I say, upon the principles laid down by James L.J. in *Cunliffe* v. *Brancker* (1) to which I have referred—namely, that you do find here powers conferred and duties imposed upon the trustees which can only be properly and satisfactorily carried out by their having the legal estate : and looking at all those considerations I come to the conclusion that the intention of the testator was that they should have the legal estate. If that be so, and the limitations in favour of the persons entitled beneficially are equitable, it is not disputed that the appellant here is right in saying there is not an intestacy but that she is

(1) 3 Ch. D. 393, 408.

entitled to have the rents and profits during the period that has been mentioned. I think, therefore, that the appeal should be allowed.

WARRINGTON L.J. I am of the same opinion. The concrete question which has to be determined in this appeal arises in this way: The order of limitations of the testator's real estate contained in his will was: first to the use of his younger son Edward for life with remainder to his first and other sons successively in tail, and with remainder to the first and other sons successively of his elder son Reginald in tail, with remainder to his daughter, the present plaintiff, for life, with remainders over. Without stating with accuracy the words in which the limitations are expressed, that is the order in which the estates were limited. What happened was this. Edward died a bachelor, and, therefore, there were no sons of his to succeed to the estate in tail limited to his sons. Reginald was still living, but he had had no sons. But being still living it was possible that he might hereafter have sons who might become entitled successively to his estate in tail male. In those circumstances is the interest of the daughter, the appellant, accelerated, with, of course, the liability to reopen in case there should be a son born to Reginald? Or, is there an intestacy during the period of suspense, practically the rest of the lifetime of Reginald?

The most important consideration, and that which really determines the whole question, if it is decided one way, is whether on the true construction of this will the interests of the beneficiaries are legal or equitable. If they are equitable there is no difficulty in giving effect to what in the ordinary case of a will would be the intention of the testator—namely, that during the suspense of one of the previous interests the next succeeding interest, if vested, as in this case, should take effect. On the whole it seems to me that the beneficial interests are equitable. But before explaining how I arrive at that conclusion I must to some extent state in greater detail and accuracy what are the limitations of the testator's will. I will first quote two passages from previous

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decisions, one from the judgment of Sir George Jessel M.R. and the other from the judgment of James L.J. which has been referred to by the Master of the Rolls.

The passage in the judgment of Sir George Jessel M.R. is to be found in *Baker* v. *White*. (1) I refer to it because it explains how it is that in a will such expressions as " to the use of trustees in trust " for so and so, or " to trustees to the use of or in trust for " so and so, come to be construed as a general rule, and in the same way as they would be construed if they were contained in a conveyance to which the Statute of Uses is directly applicable. Jessel M.R. says: " From the time of Lord Raymond it has been settled that a gift to trustees in trust to permit a man to take the rents during his life does not give the legal estate to the trustees without more. It has been treated as analogous to an executed use, not on the ground that the Statute of Uses directly applies to wills, because that statute was passed before the Statute of Devises, but upon this ground, that the will shewed an intention that the same rules which the Statute of Uses made applicable to settlements of real estate should be applied to the gifts or devises by will." Then come these words: " It was, therefore, an index of intention, and nothing more." Therefore, if one finds in this will that there are limitations which appear to create legal estates these limitations are an index of intention, and nothing more; and whether they are an index which is ultimately to guide one to the conclusion that the estates are equitable depends upon the construction of the will.

That is explained in the passage in the judgment of James L.J. in *Cunliffe* v. *Brancker* (2): " It was contended, and truly "—that is to say it was a contention which was founded upon principles of construction—" that, notwithstanding these apparently clear indications of intention that the successive beneficial devisees should have the legal estate in them, the rest of the will might still show so clearly a contrary intention that the fee should be in the trustees, that there were purposes to be effected, trusts to be executed,

(1) (1875) L. R. 20 Eq. 166, 171. (2) 3 Ch. D. 393, 408.

duties to be performed so requiring them to have the fee, that we should reject the formal limitations as the mere blundering of the draftsman, just as if they were, as they often are, found in the wills of testators who had themselves nothing but an equitable estate or a long term of years to deal with."

Bearing these two passages in mind I now turn to the interpretation of this will. Speaking generally the position is this: there are a large number of limitations which if they were contained in a deed would unquestionably give legal estates to the beneficiaries. There are also limitations which in the same way, purporting to give in express terms the legal estate to the trustees, would lead to the conclusion confirmatory of what I have just stated in other cases, that the legal estate was to be in the beneficiaries. Those would be indices of intention which would lead on to the conclusion opposite to that which I think is the true one. But then, on the other hand, there are also indications of the opposite intention here; and something more than indications. There are provisions in the will which express purposes to be effected by the trustees, trusts to be executed by them, duties to be performed by them, which seem to me to show that the testator considered that those trustees for performing those duties, and for executing those trusts, should have in them the legal estate. Taking the indications in the will as shortly as I can, they are these: The testator gives and devises, and in the exercise of any power appoints his real estate to the three trustees their heirs and assigns, and he includes in one devise real estate of both tenures, freehold and copyhold—that is a blunder, of course, one of the numerous blunders on the part of the draftsman of this will. He directs that those estates so devised and appointed are to be held unto the trustees their heirs and assigns, "But nevertheless to the uses upon the trusts and for the ends intents and purposes and with under and subject to the powers provisos declarations and dispositions hereinafter declared and contained of and concerning the same that is to say"—then comes a limitation to the use of the trustees

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for a term of ninety-nine years upon trust by various means to raise money for the purpose of paying debts, testamentary expenses, legacies, and annuities, and so forth. Of course, so far as form is concerned that is an indication that the trustees are not to take the legal estate except for that term of ninety-nine years. It is limited to that term for their use. Then come the beneficial limitations. After the expiration of that term " To the use of my younger son Edward Brooke and his assigns for and during the term of his natural life and from and after his decease to the use of the first son of my younger son and the heirs male of the body," and in default of such issue to the use of the second and every subsequent son of the said Edward Brooke and the several respective heirs male of the said son and sons and in default of such issue to the use of the trustees, their executors administrators and assigns " during the natural life of my said daughter (Constance) upon trust to receive the rents and profits," and discharge the expenses, and so forth, and to pay the residue to that daughter. Then there is a similar provision with regard to his daughter Florence. Then comes this—and the mode in which it is framed is I think of some importance : " And from and immediately after her decease to the use of such person as my said trustees or the trustees or trustee for the time being of my will shall in manner hereinafter ascertain and determine to have been at the time of my decease the heir male of the body of Sir Thomas Brooke, Knight, formerly of Holditch Hall, who died about the year 1418."

It will be observed that it is not simply a gift to the heir male of the body of the person who at his death shall be the heir male of Sir Thomas Brooke, but it is the person who shall be in the determination of the trustees the heir male of the body. It leaves it to the trustees to determine who shall be the person to take under that limitation ; therefore, there must necessarily be some gap there in the limitations to give the trustees an opportunity of ascertaining to whom the estates are to pass. Then in default of that person, and the issue of the body, there are remainders over, which

I need not read—with ultimate remainder to the right heirs of the testator.

So far one would say that the indices of his intention point to the legal estates in the beneficiaries, with the exception of the doubt which is thrown upon one, that is the gap to which I have already referred. What are the indices the other way? Generally speaking there are two matters which strike anybody who reads with care the whole of this will. The first is that the will is drawn with extreme carelessness, not to say with ignorance of conveyancing on the part of whoever drafted it. The second is that one's mind is directed throughout the will to the idea in the testator's mind that the trustees were to be not merely conduit pipes, to use the old expression—persons through whom the estates were to pass by the execution of the uses expressed in the will—but that they were to be real authorities over his estate, with duties to perform, and trusts to execute. The most striking of those passages in the will which lead to that conclusion —though there are others which point in the same way—is the management clause which has been read by the Master of the Rolls: "Provided also and I hereby declare that so long as the rules of law and equity will permit my said real estate shall be managed and the rents and profits thereof and also the dividends interest and income arising from my residuary personal estate shall be received." Pausing there, the testator puts the receipt by the trustees of the rents and profits of his estate on the same footing as the receipt by them of the dividends and income arising from the personal estate. That is an indication that they are to be in a position to receive the rents by virtue of some legal right to obtain them from persons who have to pay, just as they have a legal right to obtain as executors the interest, dividends, and income arising from the personal estate. Then the clause goes on to provide that the trustees are to make arrangements with the tenants and occupiers: "All arrangements . . . . shall be made and settled by my trustees for the time being." They are to pay out of the rents and profits all expenses connected with the collecting of the

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rents, repairs, outgoings, and so forth, and other pecuniary expenses, the description of which the Master of the Rolls has read, "and all other expenses whatsoever attending and incidental to the management of my said estates and property, also paying all annuities and other charges which for the time being may be charged thereon." Then finally: "And shall pay the balance of such rents and profits to the person for the time being entitled thereto under this my will if he or she shall be of full age. But in case of his or her minority shall and do apply so much of the said rents and profits as they or he my said trustees or trustee for the time being shall think proper for or towards the maintenance," and so forth. Then they are to lay out and invest the surplus. It seems to me that that is not (as Mr. Hurst ingeniously put it) a mere direction that the trustees are to act, whether the tenants for life act or not, as the agents of the estate, but is a power given to them by virtue of their appointment as trustees, and of the estate which the testator has devised to them, to receive the rents which he directs them to receive and thereby become possessed of the fund out of which they are to pay the expenses of the repairs, and so forth. It also shows that they are in some way or another to be entitled to enter upon the estate, because it is they who are to see to the management of the estate, the execution of the repairs, and all those matters which an owner of an estate by virtue of the powers which he has as such owner, is able to provide for. Even if the management clause had stood alone I should have been of opinion that the intention of the testator thereby expressed was a paramount intention: that it was the trustees who were to be the dominating persons in dealing with this estate so devised. But the matter does not stop there. I have already pointed out that with regard to the heir of the body of Sir Thomas Brooke who died in 1418 there was necessarily a gap in the testator's limitations, because he had to be ascertained by the trustees. The provision referring to that ascertainment is as follows: [His Lordship read the clause above set out and continued:]

The trusts in favour of that person and his issue male

are not to be absolutely void and of no effect until the expiration of the five years. During that period, therefore, the question remains in suspense, whether the trusts excepted from those provisions have taken effect or not. The testator then fills up that gap, but he does so by providing that the rents and profits shall be paid to or received by the person or persons who for the time being will be entitled thereto under the trusts of his will, in case there was no heir male of the body of Sir Thomas Brooke. That again, taken in connection with the provision as to the management and receipt by the trustees of the rents and profits, shows to my mind that during that period of the five years the rents are regarded as in the hands of the trustees by virtue of the estate which is in them, and that they are to pay them, whilst the question is still in suspense, to the person entitled at the expiration of that period. To put it quite shortly, it appears to me that, unless the trustees took the legal estate in fee, there would be extreme difficulty in carrying out the provisions of the will. If it is held that they took the estate in fee, all those difficulties disappear. It does not matter whether there are gaps in the limitations or not: those can be filled up without any breach of the technical rules relating to real estate. If effect is to be given to the clear intention of the testator, another thing which is quite clear is that, as regards Reginald, his son, who would in the ordinary course be entitled as heir at law, in the events that happened, he never intended him to take so long as there was anybody mentioned in the limitations who was capable of taking. Therefore it seems to me, with all respect to Russell J., that we ought to hold that the beneficial limitations were equitable and that the trustees took the legal estate.

If that is so, then there is no difficulty whatever in the way of the further conclusion that the vested estate or right in the daughter Constance, the present appellant, may take effect at once, because there will be no obstacle to giving effect to the testator's intention that before her shall come any son of Reginald, in case that son should

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be born. The case in fact comes within the decision of this Court in *In re Conyngham* (1), and the principles on which the Court acted in that case would be applicable to the present.

I think therefore that the order of the Court below ought to be set aside, and an order made which will give the vested beneficial interest to the present appellant.

YOUNGER L.J. The difficulty of the primary question raised upon this appeal cannot be disguised, and it is made very manifest by a perusal of the judgment of the learned judge. That question is whether on this will, and notwithstanding its phraseology, the legal estate in the realty thereby devised is indeed in the testator's trustees, so that the beneficial limitations are equitable only. That the beneficial life estate of the plaintiff, Constance Brooke, expectant on the death of her brother Reginald, without having had a son born to him is merely equitable, and that the trustees of the will during the subsistence of that life estate, as well as the life estate of her sister, Florence Boreel, which immediately succeeds it, will have the legal estate vested in them, is plain upon the actual phraseology of the will; and this circumstance, accidental though it possibly is, may have an influence upon the problem set us at more than one stage of its discussion. But this variant, by the sharp contrast it presents, between the terms in which these life estates are limited and those in which the other limitations of the will are expressed, merely serves in the first instance to increase the difficulty of the question, so carefully dealt with by the learned judge in his judgment, and so elaborately argued before us,—that question being whether the limitations of the will other than those in favour of the two daughters of the testator are equitable also, and whether there is in the trustees throughout a legal estate in the devised hereditaments. The whole difficulty here, as the learned judge points out, may well be suspected to result from a failure on the part of the draftsman of the will to combine into one harmonious whole the

(1) [1921] 1 Ch. 491.

various precedents laid under contribution in the document. In that respect his failure is certainly complete, and to the Court is left the task of seeing whether, by the application of well-ascertained rules of construction, it can evolve harmony out of this apparent discord. If the limitations of the will can be held to be equitable, all discord disappears. The learned judge, however, felt himself unable so to hold. In his view the express terms of the will were too strong. He did not, however, in detail inquire whether all the provisions of the will could have effect given them unless its limitations were held to be equitable. Accordingly it was mainly from that angle that the appeal from his decision was on this point argued before us, and it is mainly from that same angle that I propose to consider the problem with which we have to deal.

The nature of the question at issue is described not only by James L.J. in *Cunliffe* v. *Brancker* (1) in the passage already read by my Lord but also very clearly by Cotton L.J. in *Richardson* v. *Harrison* (2): "The question generally is, whether in the will it is apparent that the testator intended the trustees to have the legal estate for any limited period or for all time. On this ground, in construing wills what has been done is this, to give the legal estate in accordance with what the Court sees is the intention of the testator; therefore, when there are words of trust or words of devise to trustees to uses or upon trusts, the Court executes the uses or the trusts, not by force of the Statute of Uses, but by giving the legal estate to the trustee or to the beneficiary, according to what the Court sees to have been the intention of the testator. It must be ascertained, not merely whether any duty—any trust—is to be performed by the trustees, which requires the legal estate to remain in them, but also whether, after taking into account all that the trustees are directed or authorized to do, a judge ought to come to the conclusion that the testatrix intended them to act by virtue of the estate vested in them, or by virtue of something else—a power to limit to uses."

(1) 3 Ch. D. 393, 408. (2) 16 Q. B. D. 85, 108.

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Now the learned judge has marshalled very carefully in his judgment the indications to be found in this will confirming the view that the limitations in terms expressed as legal limitations were intended by the testator to be no less; he refers (inter alia) to the limitation in favour of the trustees for the term of ninety-nine years, a limitation which, according to Sir George Jessel M.R. in *Cunliffe* v. *Brancker* (1), would be of no use, if the trustees already had the fee: to the power of free access to the mansion house given to the trustees—unnecessary if they took the legal estate: to the power of leasing given to the tenants for life in possession other than daughters, and given to the trustees, while the daughters are actually entitled to receipt of the rents: to the trustees' power of sale expressed to be by revocation and appointment to uses, and to the clause for the purpose of protecting contingent uses and estates, unnecessary, it is said, if the limitations throughout are equitable.

The force of these considerations cannot be gainsaid. They might well in reference to most wills be compelling. But in the case of the present will there is to be found in every part of it indications expressed in different degrees of intensity which show that the testator intended that his trustees should all through be in complete control of his estate for the purpose of enabling them to discharge the very carefully defined duties which he lays upon them in relation to it. The learned judge refers to many of these in his judgment. Their cumulative effect is almost overwhelming. The trustees, out of the interest of the testator's personal property, or so much of the income of his residuary estate as may be necessary, are to provide for the proper and careful keeping of all the testator's horses, dogs and other animals, and for their ultimate burial in the Park at Ufford: the annuity charged upon his estate in favour of his son Reginald is plainly to be paid by his trustees who are empowered not only to deduct therefrom a sum not exceeding 50*l.* a year towards repayment of Reginald's debt to the testator but the interest on that debt and the premiums upon the policy securing its repayment:

(1) 3 Ch. D. 393, 400.

all annuities and allowances are to be paid out of the income of the testator's real and residuary personal estate: the duty imposed upon the trustees to see to the repairs of the testator's mansion house and the preservation of his library there and the provision and binding of further periodicals to be included in it: the taking in their own names of investments prior to the moneys so invested being laid out in the purchase of lands to be held on the trusts of the will: and the all-important management clause which places in the hands of the trustees, the complete control of the testator's real estate for so long as the rules of law and equity will permit, and expresses the right of the tenant for life for the time being to be a right as "the person for the time being entitled thereto under this my will" to receive from the trustees, for they are to pay him "the balance of such rents and profits .... if he or she shall be of full age."

Now to my mind the extreme significance of this management clause in the present will is not only due to its wide range and extent: it is shown as much by the fact that it is operative from the testator's death, during the time that a daughter is under the will entitled under the limitations of the will, as during the time when a son is so entitled: as much, that is to say, when the trustees in terms have the legal estate, as when they have not. Moreover the clause is operative also throughout the period of possibly five years in which the quest is being made for the heir male of Sir Thomas Brooke, who is stated in the will to have died about the year 1418—the beneficial interests during that period being expressed in what may fairly be regarded as ambiguous terms. When added to all that I find that the testator in the clause draws no distinction between the rights under his will of a daughter and, say, a son—who are both described as being only entitled thereunder to the balance of such rents and profits; when also I find it impossible, as I think it must be, for the trustees to perform the duties by that clause and the other provisions of the will imposed upon them unless they are clothed with the legal estate, I reach the conclusion that, according to the true intent of this will,

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the powers of the trustees under these provisions are made effective by means of an estate vested in them, and treated as vested in them throughout.

On the whole will, therefore, I find conditions which enable me to reach a conclusion which I will express in the language of two classical passages on the subject: "It is . . . . clear and settled," says Parke B., in *Barker* v. *Greenwood* (1), "that if the testator distinctly expresses his meaning to be, that the trustees are to interfere in the execution of the trusts, and certain duties are cast upon them—if he order, for example, that they shall receive the rents, &c.—there they take the legal estate, whatever words may be used." Again, in a passage in a note in 2 Wms. Saund. (2) I find this: "Where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate."

I would only further add that, as it seems to me, there is no difficulty in this will in giving, on this view of it, full effect to the intention as therein manifested even in the creation of the term of ninety-nine years. The result on the view I take is that the trusts of that term are paramount, taking priority even over any expenditure authorized under the management clause; while as to the other main formal difficulty in the way of the adoption of this view, I think that *Bagshaw* v. *Spencer* (3), if authority be needed, is sufficient to show that limitations apparently legal as uses executed may still be treated as trusts notwithstanding the insertion in the will of a devise to the trustees for support of contingent uses. I would further add that, notwithstanding some authority to the contrary, the consideration ought not here, I think, to be altogether left out of account that the devises to the trustees in the present case in terms include copyholds, to which, of course, the Statute of Uses has no application.

(1) (1838) 4 M. & W. 421, 429. (2) 6th ed., p. 11*b*.
(3) 1 Ves. Sen. 142.

It follows that if the limitations here are equitable, the appellant's claim is governed by the decision of this Court in *In re Conyngham* (1); provided that the testator has shown in this case, as he did there, a clear intention to make these equitable limitations completely exhaustive of the entire interest. For the reasons already given by the Lord Justice I think he has. In my judgment the entire interest is parcelled out amongst the successive devisees and, as in *In re Willis* (2), it is not for the present purpose unimportant to observe that the last limitation is to the testator's own right heirs. I think here, as I thought in that case, that this limitation excludes the idea of any intention or belief on the part of the testator that these heirs should or would take anything at any prior step in the limitations. If *White* v. *Summers* (3) had been cited to the learned judge, as it has been to us, I doubt whether he would have attached to the words "in default of such sons" even such significance as it seems he may have thought them entitled to. "In my opinion," says Parker J., in the case cited, "the words 'in default of such issue' are, and as a matter of conveyancing always have been, considered and used as apt words for the introduction of a remainder and not as words of contingency."

In my judgment, accordingly, the appeal of the appellant succeeds. She is now entitled to the interest which she claims during her life so long as the respondent Reginald Brooke has no son.

This view renders it unnecessary for me to determine how far my conclusion in this case would have been displaced if the limitations in this will, other than those in favour of the daughters, had been legal and not, as I think they are, equitable only. I would merely say on that subject that the discussion of it contained in Russell J.'s judgment, as well as the arguments before us, have satisfied me that, without further consideration, this matter cannot, in this Court, be treated as being concluded by the decision in *In re Scott.* (4) I am myself at present much impressed by the learned judge's

(1) [1921] 1 Ch. 491.
(2) [1917] 1 Ch. 365, 372.
(3) [1908] 2 Ch. 256, 271.
(4) [1911] 2 Ch. 374.

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suggestion that, in view of the wording of the Contingent Remainders Act, 1877, the limitations in this will subsequent to the limitation in favour of Reginald's first son in tail male may take effect by virtue of the statute as executory limitations. I am impressed also by the fact that in the present case the next succeeding limitations being purely equitable, the technical difficulty which was treated as fatal in *In re Scott* (1) would not here arise—namely, the impossibility of a legal estate in remainder being brought to an end so as to let in an estate previously limited. Still more, as a result of the argument before us, am I impressed with its being permissible to apply, even where the limitations are purely legal, the doctrine applicable in cases of merger in such a way as to make it possible to give effect to the testator's clear intent—a result invariably in accordance with what must always be the object of the Court in construing wills unless it be effectually prevented by some compelling rule of law or construction to the contrary. I leave all these matters for consideration when they arise. It is unnecessary, in the view I take of this case, to decide any of them now.

In agreement with my Lord and the Lord Justice, I think this appeal should be allowed for the reasons I have given.

Appeal allowed.

Solicitors: *Corbould, Rigby & Co.; Lawrance, Webster, Messer & Nicholls.*

(1) [1911] 2 Ch. 374.

W. I. C.

ASTBURY J.

1923

June 4, 5, 7.

In re COLNBROOK CHEMICAL AND EXPLOSIVES COMPANY, LIMITED.

ATTORNEY-GENERAL *v.* THE COMPANY.

[1919. C. 2399.]

Emergency Legislation—Defence of the Realm—Mortgage to Minister of Munitions—Guncotton Factory—Farm Land—Seizure of Factory by Minister under Defence of the Realm Powers—Appointment of Receiver of Farm Land under Mortgage Powers—Foreclosure Action—Liability to account for Dealings with Factory—Defence of the Realm Regulations, rr. 2 *B*, 8—*Indemnity Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 1; *s.* 2, *sub-s.* 1 (*b*).

The Minister of Munitions being mortgagee of a guncotton factory and certain farm land took possession of and worked the factory under the powers of the Defence of the Realm Acts, Regulations and Orders hereinafter called D.O.R.A. and appointed a receiver of the farm land under the mortgage powers.

On a subsequent foreclosure action brought by the Attorney-General on behalf of the Crown as beneficial owner of the mortgage:—

Held, that the plaintiff was entitled to an ordinary foreclosure decree, and that in taking the account necessary to fix the amount due for redemption he was not liable to account for the Minister's dealings with the factory under D.O.R.A., but that any claim on account of those dealings must go before the Losses Commission under the Indemnity Act, 1920.

Foreclosure Action.

The above Company was incorporated on July 20, 1915, for the manufacture of chemicals and explosives. The authorized capital was 21,000*l.* divided into 20,000 preferred ordinary 1*l.* shares and 20,000 management shares of 1*s.* each.

The Company had issued two debentures secured by a trust deed of February 28, 1916. The amount outstanding was now 25,000*l.*

The Company carried on business at Colnbrook as tenants of the Belgian Government, who owned certain freehold lands there on part of which they had built a factory, the rest being farm land.

In April, 1916, the Company was under contracts to deliver certain quantities of guncotton to the Belgian and British

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Governments, but had been unable to fulfil its obligations for want of funds, and it became necessary to obtain a loan from the Ministry of Munitions.

By a Supply Agreement of April 14, 1916, made between the Minister of Munitions, the Commission Belge, the Company, and the Wraysbury Company, which held the bulk of the Company's shares, it was agreed (clause 1) that the Belgian contracts, subject to certain agreed liquidated damages, should be cancelled and (clause 2) the Commission Belge would convey the freehold property and factory at Colnbrook to the Company for 9437*l.* and (clause 4) the Minister would advance 21,437*l.* to the Company, being 9437*l.* for the purchase price and 12,000*l.* for the maintenance of the factory and working capital. This advance was to be secured by a first mortgage at 6 per cent. in a form annexed to the agreement.

By clause 5 the purchase money was to be paid direct to the Commission Belge and the 12,000*l.* was to be advanced in instalments on proper certificates of expenditure. By clause 6 the Company undertook to procure postponement of the debenture charge and by clause 7 the Wraysbury Company agreed to transfer 14,500 fully paid ordinary shares and 20,000 fully paid management shares in the Colnbrook Company to the Minister, who was to retain them so long as the agreement was in force and then retransfer them to the Wraysbury Company.

By clause 9 the Company agreed to complete the buildings, machinery, plant and works at the factory, and by clauses 10, 11 the Company was to deliver certain quantities of guncotton to the Commission Belge, and subject thereto it was to deliver certain quantities to the Minister at the dates and prices therein mentioned.

As between the Minister and the Commission Belge it was agreed (clause 20) that if the Minister by virtue of the powers in the mortgage or in consequence of any default of the Company or for any other reasons or by any other means should take possession or charge of the working of the factory he would work the factory and carry out the Company's

obligations to the Commission Belge regarding deliveries of guncotton.

These transactions were carried out on May 6, 1916, when the purchase was completed, and the shares transferred to the Minister, who thus obtained complete control of the Company during the continuance of the agreement.

By the mortgage of May 6, 1916, made between the Company, the debenture trustees, the debenture holders and the Minister, after reciting the Supply Agreement of April 14, the Company, with the assent of the debenture trustees, and the debenture holders, who postponed their security, conveyed the freehold premises at Colnbrook then used partly as a farm and partly for the purposes of a factory, together with all buildings erected thereon, to the Minister by way of mortgage for securing the advance of 9437*l.* and further advances, which with the same assent the Company also charged on its undertaking and assets by way of a floating charge in priority to the debentures.

Clause 5 entitled the Minister at any time after the mortgage to sell the property as if the statutory power of sale had arisen, but he was only to exercise this power on certain events (inter alia): "If the Company should make default in the delivery of guncotton to the Commission Belge or the Minister at the dates and in the quantities specified in the Supply Agreement."

Clause 6 empowered the Minister as soon as the power of sale became exercisable to appoint a receiver of the income of the mortgaged premises and of such part of the mortgaged premises as consisted of book and other credit bills notes money securities for money and other things in action, and manager of the Company's business, the receiver to be deemed the Company's agent, and the Company to be solely responsible for his acts or defaults. The receiver after discharging costs charges and expenses of collection including the costs of carrying on the business and discharging rents taxes rates and outgoings and commission was to pay the balance of the moneys received by him to the Minister, who was to apply it in payment of the principal and interest thereby secured,

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with power nevertheless to apply it in payment of fire insurance premiums repairs or maintenance of the premises.

Clause 8 provided that the Minister might when the power of sale became exercisable enter upon and take possession of the mortgaged premises or such part thereof as he thought proper, and might, but should not be obliged to, carry on the Company's business upon the premises and might manage and conduct the same as he thought proper and might close abandon or discontinue any part thereof and open reopen or commence any part of the business that had been discontinued or closed, and might employ managers agents clerks servants and workmen in the business upon such terms as he thought fit, and fix and pay their remuneration, and might make purchases and sales of stock plant and machinery and renew and replace exhausted worn out lost or unserviceable plant machinery stock in trade and effects and generally might do all such acts and things as he could do if he were carrying on the business wholly on his own account without being responsible for any loss or damage that might arise thereout and without being accountable as a mortgagee in possession. The Minister was to be entitled to the benefit of any subsisting contracts to which the Company was a party, whether for the supply of goods or for the rendering of services or otherwise. He was to apply the moneys received in connection with the business first in paying expenses and outgoings incurred in connection therewith and all expenses of management and of conducting the business and was to apply the balance as if the same were moneys arising from the exercise of the power of sale.

The Company however still found its working capital wholly insufficient, and on June 16, 1916, the Company's solicitors wrote to the Minister stating that in view of this position the directors did not consider that they would be justified in continuing the Company's business for the production of guncotton for the Belgian and English Governments.

On June 22, 1916, the Minister, purporting to act under the Defence of the Realm Acts, Regulations, and Orders hereinafter called D.O.R.A., requisitioned possession and delivery of

the factory, the land, buildings and plant used in connection therewith, all stocks of raw or manufactured materials, tools, etc., thereon, accounts, records and other documents, and current contracts and orders. A formal inventory was made on behalf of the Minister and the Company, but it was mutually agreed that a valuation was unnecessary.

On the same day the Minister in order to cover any matters outside D.O.R.A. appointed a receiver and manager under clause 6 of the mortgage.

The Minister's official took possession of the factory and everything connected therewith, retaining the existing staff, and the receiver took possession of the farm land and certain cash and book debts.

On July 7, 1916, a creditors' petition to wind up the Company was presented, and on June 4, 1919, a compulsory order was made.

On November 14, 1919, the Attorney-General on behalf of the Crown, with the leave of the Registrar in Companies Winding Up, commenced this action against the Company, the debenture holders, and their trustee for a declaration that the Crown was entitled to the benefit of the mortgage, and for foreclosure. The present and former Minister of Munitions and the Treasury Solicitor in whom their official property is now vested were added as formal defendants.

The plaintiff claimed an ordinary foreclosure decree with the usual account of what was due to the Crown or the Minister under the mortgage, including the receiver's account.

The Company submitted that the plaintiff must account for all that the Minister had seized, and give credit for all profits in money or money's worth actually obtained by working the factory, and that an account should be directed on that footing.

The debenture holders who had put in a claim before the Losses Commission and undertaken to make no further claim asked that any order should be without prejudice to their rights.

Regulation 2 B of the Defence of the Realm Regulations provides that "It shall be lawful for . . . . the Minister of

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Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the production thereof. . . . . The price to be paid in respect thereof shall in default of agreement be determined by " the compensation tribunal.

Regulation 8 provides that " The . . . . Minister of Munitions may take possession of any factory or workshop or of any plant belonging thereto . . . . and may use the same for His Majesty's naval military or air service at such times and in such manner as . . . . the Minister of Munitions may consider necessary or expedient."

The Indemnity Act, 1920, provides by s. 1 that no action shall be instituted in respect (inter alia) of any act matter or thing done in good faith under D.O.R.A.

Sect. 2, sub-s. 1 (*b*), provides that " Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person . . . . who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of . . . . any power relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage; and such payment or compensation shall be assessed " by the Losses Commission, whose decision shall be final.

The case was argued on June 4 and 5, when judgment was reserved. The case was dealt with on the footing that the Minister mortgagee was himself seeking foreclosure, the Crown being merely a cestui que trust bound by his acts. The arguments being fully stated and dealt with seriatim in the judgment are here omitted.

Sir Douglas Hogg A.-G., *Clauson K.C.* and *Dighton Pollock* for the Crown.

Upjohn K.C. and *Roland Burrows* for the Company.

Greenland for the debenture holders and their trustee.

Gavin Simonds for the formal defendants.

Cur. adv. vult.

June 7. ASTBURY J. [after stating the nature of the action and the preliminary facts:] The main point of the defence is that the Minister must be deemed to have taken possession under his mortgage powers, and that the Company is entitled to have included in the redemption account full accounts in connection with that possession. The Company however is in liquidation and is probably wholly unable to redeem, in whatever way the redemption amount is arrived at.

[His Lordship then read the Supply Agreement of April 14, 1916, and the mortgage of May 6, 1916, and continued :]

The power of sale having arisen the Minister appointed a receiver under the mortgage and purported to take possession under D.O.R.A. The receiver was appointed of the farm land and other unimportant matters comprised in the mortgage, but the factory, war stock, and war-material-delivery contracts were according to the Minister taken over not under clause 8 but under D.O.R.A.

The question is whether clause 8, which unquestionably empowered the Minister to do all he did, is to be deemed to govern the acts which he purported to do under D.O.R.A. If so, the accounts would have to embrace the whole of the matters connected with the taking of possession, including (inter alia) the Minister's obligation to account not only for moneys received but probably for the value of assets created by him during his possession, subject only to his non-liability for an account on the footing of wilful default.

It will be necessary to decide whether the Minister took possession of the factory and its materials under D.O.R.A. or under clause 8 of the mortgage, and if under D.O.R.A. whether he is still liable to account generally and not only in respect of the receiver's receipts and expenditure.

[His Lordship then read the letter of June 16, 1916, to the effect that the Company could no longer carry on, and continued :]

On receipt of that letter the Minister was under an obvious duty to see that the Company's output of war material was secured for the purposes of the nation.

[His Lordship then referred to the circumstances in which

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the Minister had decided to take possession of the factory under D.O.R.A. and also ex abundanti cautela to appoint a receiver under the mortgage to cover matters, if any, outside D.O.R.A., and to the way in which this decision was carried out. His Lordship then read the Defence of the Realm Regulations, rr. 2 B and 8, and continued :]

In *Parkinson* v. *Hanbury* (1) the headnote states : "A mortgagee who takes possession of the mortgage estate is, on a bill for redemption, bound to render an account of rents and profits received, and is also liable for all which he might have received but for his wilful default ; but where persons, who though in fact mortgagees, enter into possession of the rents and profits in another character, they cannot be subjected to that special liability. Their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established."

[His Lordship then read s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920, and continued :]

The Attorney-General rightly contends that if and to the extent that the Minister took possession of this factory and its assets under D.O.R.A., the Company, notwithstanding the mortgage, though entitled to recover any direct loss or damage suffered by it in consequence of the Minister's action under D.O.R.A., can only recover the same as assessed by the special tribunal provided by the Indemnity Act.

The case has been argued with great ability and conciseness, and if I do not do justice to counsel's arguments, it is certainly not their fault.

The Company relies on three main contentions : (1.) that the Minister must be taken to have gone into possession under clause 8 and not under D.O.R.A. ; (2.) that in any case, though not liable to account on the footing of wilful default : *Parkinson* v. *Hanbury* (1), he is liable to account in the present foreclosure action in respect of his conduct as a whole, he having instituted these proceedings claiming the equitable relief of foreclosure and being in fact a mortgagee ; (3.) that failing this account, the Company will be deprived

(1) (1867) L. R. 2 H. L. 1.

of any effective remedy in respect of loss and damage suffered by reason of the Minister's acts.

For the first point the Company relies on many facts, circumstances and legal contentions. It contends that as the Minister had power under clause 8 to do all he did, it would be inequitable not to take the whole accounts relating to his possession in these proceedings. It correctly points out that a different question arises under D.O.R.A. and under clause 8, the main difference being that under the Indemnity Act the Company is only entitled to recover any "direct loss or damage" suffered by reason of the Minister's action, whereas under clause 8 the Company would probably be entitled not only to full accounts of the Minister's expenditure and receipts, but also to have a value put upon the very large quantity of guncotton and war material produced by him at this factory during his possession.

The Company contends that in these circumstances the Minister ought not to be allowed to deny that he acted under clause 8, particularly as he did many acts said not to be justified under D.O.R.A.; and that, this being a foreclosure action, the Minister is bound to give credit for all the benefits he actually received by taking possession, especially having regard to the fact that he had previously obtained practically all the issued share capital, and had the Company entirely at his mercy.

The Company points out that the mortgage recites the Supply Agreement and the contracts with the Belgian and British Governments, all made in wartime with the view of making guncotton for the country's benefit; and contends with some force that clause 8, which is wholly in favour of the Minister, was agreed to for the purpose of enabling him to do what he actually did; and that in these circumstances the Court, unless compelled to the contrary, ought to assume that clause 8 was applied, particularly as it is alleged that much was done not justifiable under D.O.R.A., and the Minister must be presumed to have acted lawfully throughout.

The Company further forcibly contends that if it is

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compellable to go before the Losses Commission, it might find it impossible to establish that it had suffered any "direct loss or damage" at all owing to the Minister's acts, seeing that the Minister had full power under clause 8 to do these very acts; and that the Commission might say that the Company could not have suffered any "direct loss or damage" by reason of the Minister acting under D.O.R.A. when he had full right to do exactly the same thing under clause 8.

As to the acts said to be unjustified by D.O.R.A., the Company contends that under reg. 8 the Minister had power only to take possession of the factory, workshop and plant, and nothing more, especially books and pending contracts, and that under reg. 2 (*b*) the Minister's powers were limited to taking possession of material and stores and did not extend to the Company's books and documents and contracts for the delivery of raw material. It further points out that the Minister is bound to fix and pay a price for all materials taken, and that he deliberately avoided following up his inventory with a valuation.

The acts alleged to be unauthorized by D.O.R.A. shortly are that the Minister took possession of the Company's books, records and documents; he took possession of and carried out current contracts for the supply of raw material; he took over the company's employees en bloc; and he took over the outward contracts for delivery to the Belgian and British Governments, certainly the former. In other words, he did not merely take over the factory and its plant as authorized by D.O.R.A., but took over and carried on the business as a whole, and clause 8 was therefore the only appropriate machinery justifying all this conduct with a view of obtaining not only the benefits of D.O.R.A. but considerable further advantages.

The Company's second point is that whether this be so or not the Minister is liable to account in this action for all his acts under D.O.R.A. Having on this hypothesis acted partly under D.O.R.A. and partly under clause 8, and having asked for an account in an action for the equitable relief of foreclosure, he must do equity, and account for his acts and

dealings with the whole mortgage property, though not on the footing of wilful default.

Having regard to *Attorney-General* v. *De Keyser's Royal Hotel* (1) it is plain that the Company is entitled in some way to be compensated for the property and rights seized. It contends that this compensation ought to be ascertained in the accounts in this action, which must in any event be taken in part, and that it ought not to be relegated to the Compensation Tribunal for the taking of what it says is really part of the redemption account in this action, and not a claim for compensation under the Indemnity Act at all.

To put it shortly: The Company contends that the Minister cannot escape from the position that he was in fact pursuing the rights of a mortgagee, and dealt as such with the mortgage property in a way authorized by the mortgage, and that a mortgagee cannot foreclose without bringing all benefits actually received by him in dealing with the mortgage property into account in fixing the redemption money.

The Attorney-General answers these points as follows. He submits that it is impossible to assume that the mortgage was intended to deprive the Minister of his rights under D.O.R.A. or to prevent him doing his duty thereunder. He rightly says that the mortgage was given to secure 21,437*l.* lent to the Company to assist and possibly enable it to carry on a business of a character then useful to the country. He points out that notwithstanding the very full powers of the mortgage it might have been necessary and right for the Minister to exercise his powers under D.O.R.A. before the power of sale had arisen or clause 8 become applicable.

As to the suggestion that the Minister has done various acts said not to be justified under D.O.R.A., the Attorney-General wholly disputes the facts relied on and the conclusions therefrom, and rightly points out that if the Minister did in fact take possession under D.O.R.A. and if in doing so he exceeded his statutory powers it does not justify the Court in saying that he acted under a clause that he did not

(1) [1919] 2 Ch. 197; [1920] A. C. 508.

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intend to act under, and did not act under D.O.R.A. as he expressly purported and intended.

As to the acts alleged to be outside the powers of D.O.R.A., he rightly submits that the power to seize and take the factory necessarily includes what in ordinary circumstances is necessary to carry on the factory business. The Company might have been working secret processes, and there might have been many other facts making the possession of the books, documents and records essential for working the factory. The Minister being entitled to seize raw material, was entitled to take over any contract for its supply. He was entitled to employ any one he chose, and the fact that he found it convenient to employ the old staff was immaterial. He was also bound by clause 20 of the Supply Agreement to carry out the outward contract with the Belgian Government.

As to the point that whether the Minister acted under D.O.R.A. or not he is bound to account fully in this foreclosure action, though not on the footing of wilful default, the Attorney-General points out that the Minister's proceedings under D.O.R.A. constituted an exercise of his statutory right and duty wholly irrespective of his position as mortgagee, and that he was bound not only to exercise his duty, but also to give compensation in the way the statute provided.

As to the point that, failing the inclusion of a full account in this action, the Company will be without remedy before the Tribunal, the Attorney-General rightly points out that, whatever the result, the Company as well as the Minister is bound by the Indemnity Act. But he rightly says that the Tribunal will be bound to take into consideration the fact that the Minister acted under D.O.R.A. and not under clause 8 at all.

Lastly he says that it would be really impossible fairly and honestly to the country to take the guncotton manufacture accounts in this action. It would probably be wholly impossible, owing to the war, to fix a proper price, and the practical impossibility of taking the accounts of the manufacture and value of the material in an action of this sort is one of the

reasons why provision is made in the Indemnity Act for taking an account of the loss sustained, irrespective of any such account.

The Attorney-General is plainly right in saying that having regard to the impossibility of taking such an account in a foreclosure action, the Minister, in justice to the nation, really could not properly have seized under clause 8 at all, when he had a statutory right and duty to act otherwise, and a statutory provision as to the consequences of his acts as between him and the Company.

In these circumstances I hold as a fact that the Minister intended to and did in fact take possession under D.O.R.A. of the factory and its assets, books, documents and papers, war stores and war materials contracted to be delivered under pending contracts; and that as mortgagee, through his receiver, he took possession of certain other property, being principally farm lands and premises, cash, bank balance and book debts.

There must therefore be a common foreclosure order. The accounts under this order will be limited to the principal moneys and interest and to the receiver's receipts and payments, including an occupation rent of the property taken by him. The judgment will be without prejudice to any claim that may validly be brought before the War Losses Commission by the Company and the debenture holders.

Solicitors: *Treasury Solicitor; Dehn & Lauderdale; Cooper & Co.; Freshfields, Leese & Munns.*

G. R. A.

ASTBURY J.

1923

June 11.

In re SARJEANT.

[10 of 1922.]

Bankruptcy—Successive Bankruptcies—Undischarged Bankrupt—After acquired Property—Death of Bankrupt—Administration Order under s. 130—*Not a Second Bankruptcy—Inapplicability of s.* 39—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 39, 130.

An order under s. 130 of the Bankruptcy Act, 1914, for the administration of the estate of a deceased undischarged bankrupt according to the law of bankruptcy, is not a second or subsequent receiving order or adjudication within s. 39 so as to divest the estate of the trustee in bankruptcy in favour of the official receiver under the administration order; but the bankrupt's estate including any after acquired property remains vested in his trustee in bankruptcy.

Hasluck v. *Clark* [1899] 1 Q. B. 699 applied.

SPECIAL CASE.

On April 24, 1909, a receiving order against the debtor was made in the Northampton County Court, and on April 29, 1909, he was adjudicated a bankrupt and an order for summary administration was made. The Northampton official receiver was the trustee.

The debts were 495*l.* and the assets 7*l.*, but taking account of costs there was a deficiency of 515*l.* No dividend was paid, nor did the bankrupt obtain his discharge, nor was the adjudication annulled.

In August, 1920, the debtor commenced business as a chemist in Kent. On May 2, 1922, he died intestate, and on July 22, 1922, his widow took out letters of administration.

On November 14, 1922, the administratrix in pursuance of s. 130 of the Bankruptcy Act, 1914, obtained an order in the Maidstone County Court for the administration of the estate according to the law of bankruptcy.

The unsecured liabilities exclusive of the 515*l.* deficiency in the Northampton bankruptcy were 476*l.* and the assets 437*l.* These liabilities and assets were all incurred and acquired long after the Northampton adjudication.

The question arose whether the assets were vested in the

Northampton official receiver on behalf of the creditors in the Northampton bankruptcy, or whether by virtue of s. 39 they were vested in the Rochester official receiver on behalf of the creditors under the Maidstone administration order, and if the latter, whether the Northampton official receiver was entitled to prove in the administration for his deficiency.

On January 17, 1923, the Rochester official receiver having given notice to the Northampton official receiver applied to the Maidstone County Court for directions under r. 321 of 1915, and the judge at the request of all parties stated this case for the opinion of the High Court under s. 100, sub-s. 3.

Tindale Davis for the Rochester official receiver. The question is whether the provisions as to a second bankruptcy in s. 39 apply to an administration order under s. 130.

Sect. 39, sub-s. 1, provides that in the event of a second or subsequent "receiving order" being made against a bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in the preceding bankruptcy shall (with exceptions immaterial hereto) vest in the trustee in the subsequent bankruptcy, but any unsatisfied balance of the debts provable in the preceding bankruptcy may be proved in the subsequent bankruptcy by the preceding trustee.

Sub-sect. 2 provides that where a trustee in any bankruptcy receives notice of a subsequent petition in bankruptcy against the bankrupt, he shall hold any property then in his possession, acquired by the bankrupt since the adjudication, until the subsequent petition has been disposed of, and if an order of adjudication is made on the subsequent petition he shall transfer that property to the trustee in the subsequent bankruptcy.

Sect. 130, sub-s. 1, provides that any creditor of a deceased debtor, whose debt would have been sufficient to support a bankruptcy petition, may present a petition for the

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administration of the deceased debtor's estate according to the law of bankruptcy.

Sub-sect. 2 provides that upon the prescribed notice being given to the legal personal representative, the Court, unless satisfied that there is a reasonable probability of the estate being solvent, may make an administration order.

Sub-sect. 4 provides that upon an administration order being made the debtor's property shall vest in the official receiver of the Court as trustee, and he shall realize and distribute it in accordance with the Act. Provided that the creditors shall have the same powers as to appointment of trustees and committees of inspection as they have in other cases where the debtor's estate is being administered or dealt with in bankruptcy.

Sub-sect. 5 provides that, with certain immaterial modifications, all the provisions of Part 2 of the Act (relating to the administration of a bankrupt's property) shall, so far as the same are applicable, apply to the case of an administration order under the section in like manner as to an order of adjudication under the Act.

Sub-sect. 8 provides that notice to a deceased person's legal personal representative of the presentation by a creditor of a petition under this section shall, in the event of an administration order being made thereon, be deemed to be equivalent to notice of an act of bankruptcy.

Sub-sect. 9 enables a deceased debtor's legal personal representatives to present a petition for the administration of his estate under the section.

Now Part 2 headed "Administration of Property" consists of ss. 30 to 69, so that prima facie s. 39, which comes under the sub-heading "Property available for payment of debts," is incorporated in s. 130.

A mere receiving order does not vest property, so that in order to render s. 39, sub-s. 1, intelligible and consistent with sub-s. 2 it must be read "In the event of a second or subsequent receiving order followed by an adjudication being made." In other words s. 39 is really dealing with a subsequent adjudication. But an administration order under

s. 130 is to all intents and purposes equivalent to a posthumous adjudication in bankruptcy. It can be made on a creditor's petition, or on the petition of the deceased debtor's legal personal representative, just as if it were made on his own petition in his lifetime. Surely it is equivalent to a second adjudication within s. 39, so that the provisions of s. 39 are applicable.

I admit that s. 42 (voluntary settlements) is not applicable: *In re Gould* (1), a decision on the corresponding ss. 47, 125, of the 1883 Act. Nor is s. 40, sub-ss. 1, 2 (execution creditors), formerly s. 45, applicable: *Hasluck* v. *Clark.* (2) But there is no decision that the new s. 30 is inapplicable, and the general observations of Vaughan Williams J. in *Watkins* v. *Barnard* (3) as to the prima facie applicability of the various sections of Part 3 of the 1883 Act to an administration order under s. 125 are strongly in my favour.

Hansell for the Northampton official receiver. Sect. 130 (formerly s. 125) deals with the mode of administration only, and not with the subject matter to be administered. It deals with the deceased debtor's estate and nothing else. Its effect is to divest out of the administratrix the personalty vested in her at the time of the administration order and to vest the same in the official receiver of the Court making the order: *Hasluck* v. *Clark.* (4)

In the present case the whole property was already vested in the Northampton official receiver: *In re Clark.* (5) Nothing was vested in the administratrix, and there was nothing for the administration order to operate on. A nugatory administration order is clearly not a receiving order or adjudication within s. 39.

ASTBURY J. [after stating the facts]. The question is whether the assets acquired since the 1909 Northampton bankruptcy are vested in the Northampton official receiver on behalf of the creditors in that bankruptcy, or whether by virtue of

(1) (1887) 19 Q. B. D. 92.
(2) [1899] 1 Q. B. 699.
(3) [1897] 2 Q. B. 521, 524, 525.
(4) [1899] 1 Q. B. 699, 705, 707.
(5) [1894] 2 Q. B. 393.

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s. 39 they are vested in the Rochester official receiver on behalf of the creditors under the 1922 administration order.

The point is quite plain, and there is little to decide. Sect. 39, reading it shortly, provides that in the event of a second or subsequent " receiving order " being made against a bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented, had not been distributed amongst the creditors in the preceding bankruptcy, shall vest in the trustee in the subsequent bankruptcy, with the right of the preceding trustee to prove for any unsatisfied balance.

As a mere receiving order does not vest property I suppose that means a receiving order followed by an adjudication and appointment of a trustee.

Under s. 130, sub-ss. 1, 2, and 9, the legal personal representative of a deceased debtor may present a petition for the administration of his estate according to the law of bankruptcy, and unless there is a reasonable probability of the estate being solvent the Court may make an administration order, whereupon the debtor's property vests in the official receiver of the Court as trustee. Sub-s. 5 provides that the provisions of Part 2 of the Act (relating to the administration of a bankrupt's property) shall, so far as applicable, apply to an administration order.

That merely means that on the intestacy of an insolvent his administratrix can call in the aid of the Bankruptcy law and have his estate administered accordingly. But here the insolvent's estate was already vested in the Northampton official receiver, and no estate passed to the administratrix at all. An order for the administration of a non-existing estate is clearly not a " receiving order " within s. 39.

The effect of the former s. 125 (now s. 130) is dealt with in *Hasluck* v. *Clark* (1), where the Court of Appeal point out that the section deals with the mode of administration only and not with the subject matter to be administered, which subject matter in fact is the estate vested in the deceased debtor at the time of his death. In the present case that

(1) [1899] 1 Q. B. 699, 705, 707.

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estate was already vested in the Northampton official receiver; the administration order under s. 130 had nothing to operate on; and s. 39 has no application. The assets therefore remain vested in the Northampton official receiver.

Solicitors: *Tarry, Sherlock & King, for Monckton, Son & Collis, Maidstone.*

Solicitor to Board of Trade.

G. R. A.

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In re MARJORIBANKS.

MARJORIBANKS *v.* DANSEY.

[1922. M. 4270.]

Will—Bequest of "annual produce" of an Estate—Cumulative Preference Shares—Dividends declared after Testatrix's Death—Whether Income or Capital.

By her will the testatrix bequeathed her residuary estate to her trustee upon trust for sale and conversion, but with power to postpone, and directed him to pay the income or annual produce of the trust fund to D. for life, and to apply the net annual produce from the unconverted part of her estate as if it were the income of the proceeds of conversion. The testatrix owned two thousand four hundred fully paid cumulative preference shares in a company, and under the Articles was entitled to be paid out of available profits a cumulative preference dividend of 10*s.* per share, in addition to a sum of 7*l.* per share. At the death of the testatrix, in 1920, there was due to her, on balance, a sum of 3*l.* 15*s.* per share in respect of the 7*l.* The right to that balance was contingent on the company making a profit and not carrying it to reserve. On September 5, 1922, the directors passed a resolution "to transfer 80,000*l.* from Reserve to Profit and Loss Account, and to declare and pay a dividend of 1*l.* 17*s.* 6*d.* on the preference shares being the equivalent of three and three-quarter years' dividend on account of arrears." In pursuance of the resolution 3150*l.* was paid to the executors of the testatrix:—

Held, that on the contingency happening the shareholder then entitled to the shares was entitled to the money which was the equivalent of the right which was once contingent but then became absolute, and that the 3150*l.* was income, which became payable for the first time in 1922, and passed to the tenant for life under the terms of the will as "annual produce" of the estate.

ADJOURNED SUMMONS.

By her will, made in July, 1917, the testatrix gave her residuary estate to her trustee upon trust for sale and

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conversion but with power to postpone. She directed her trustee to "pay the income or annual produce of the trust fund" to the defendant Edward Dansey for life, and, subject thereto, to hold the capital for certain other persons represented by the second defendant Madeline Dansey. The testatrix declared: "That all the net annual produce arising from the unconverted part of my estate whether real or personal and of whatsoever description shall be applied in the same manner as if the same were income arising from the proceeds of the conversion of my estate." The testatrix owned two thousand four hundred fully-paid cumulative preference shares in Meux's Brewery Company. They were 10*l.* shares carrying a fixed preferential and cumulative dividend at the rate of 5 per cent., ranking on the assets in priority to the ordinary shares, and having such preferential rights in respect of capital as was provided by the articles of association.

Art. 114 provided: "Subject as aforesaid (that is, the power to carry profits to the reserve fund), the profits of the company made during the financial year or other period included in the accounts submitted to the ordinary meeting in each year shall be applicable first to the payment of the cumulative preferential dividend on the preference shares in the original capital up to the end of such year or other period."

Art. 116 provided: "The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits."

Art. 117 provided: "No larger dividend shall be declared than is recommended by the directors but the company in general meeting may declare a smaller dividend. Profits carried forward shall be treated as profits of the current year."

Art. 118 provided: "No dividend shall be payable except out of the profits of the company, and no dividend shall carry interest as against the company."

Art. 119 provided: "The declaration of the directors as to the amount of the profits of the company shall be conclusive."

In 1918 the company reduced its capital from 1,000,000*l.*, divided into 5000 ordinary shares of 100*l.* each and 50,000 preference shares of 10*l.* each, to 360,000*l.*, divided into 5000 ordinary shares of 2*l.* each and 50,000 preference shares of 7*l.* each. At the same time the company passed a special resolution cancelling art. 114 and substituting for it the following: "The preference shares shall confer on the holders thereof the right to a fixed cumulative dividend of 10*s.* per share and in addition the sum of 7*l.* per share in respect of past cumulative dividends thereon unpaid up to July 31, 1918 (payable with a limited preference as hereinafter appears), and to a bonus of 3*l.* per share upon a winding up of the company, and shall rank as regards return of capital and the payment of the said bonus in priority to the other shares in the company's capital, but shall not confer any further right to participate in profits or surplus assets. The profits of the company in each year, subject to the powers conferred on the directors under art. 107 (that is, the power to carry profits to reserve), shall be applicable first in payment of the dividend for the current year on the preference shares and the balance after such payment shall be applied (until repayment in full of all arrears from time to time of cumulative dividends) as regards nine-tenths thereof (if and so far as required for that purpose) in or towards payment of the said arrears, and the remainder (or such part of the balance as is not required for payment of such arrears) in payment of dividends on the ordinary shares." Those resolutions were confirmed in May, 1918. The testatrix died in August, 1920. During her life the company had paid to her 3*l.* 5*s.* in respect of the 7*l.*, leaving a balance unpaid at her death of 3*l.* 15*s.* On September 5, 1922, the directors passed the following resolutions: "Reserve. It was resolved to transfer 80,000*l.* from Reserve to Profit and Loss Account."

"Preference Share Dividend. It was resolved to declare and pay a dividend of 1*l.* 17*s.* 6*d.* on the preference shares, being the equivalent of $3\frac{3}{4}$ years' dividend on account of arrears, and that instructions be and are hereby given for a copy of a circular letter to that effect to be posted to each

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of the preference shareholders on September 30, 1922, together with the warrant for the amount of the dividend less tax at 6*s.* in the £." The circular letter, signed by the chairman of the company, was as follows: "The purchase price for the land in Tottenham Court Road has now been received and your directors have transferred 80,000*l.* from the reserve fund and placed it to the credit of the profit and loss account. This enables them to declare a distribution of 1*l.* 17*s.* 6*d.* a share on account of the arrears of dividend on the preference shares and a warrant for the amount due to you is inclosed. The profits out of which the dividend is now paid were earned in the years 1920 and 1921." Accordingly the sum of 3150*l.* was paid to the executors of the testatrix and the question was whether the sum was income of the residuary estate, or whether it should go to corpus and be added to the capital of the residue.

Bryan Farrer for the trustee.

G. B. Hurst K.C. and *Warwick Draper* for the tenant for life. There is no right to a dividend until profits are made and a dividend declared. Each dividend is declared for the current year and the shareholders then, and not until then, because of the provision that the dividends shall be cumulative, acquire a right to have for that year, not *xl.* per cent., but that sum with the addition of the income they did not receive in the previous years: *In re Wakley*. (1) Therefore the dividend declared in September, 1922, was in fact and in law a dividend for 1922. The Court will not in considering whether the dividend should go to the tenant for life or to a remainderman take into account that the dividend is stated to be "on account of the arrears of dividend on the preference shares." A shareholder has no right to any dividend until there are profits available and the company has determined to distribute them. When those events happen the shareholder who is then entitled to the shares takes the dividend although, in the case of cumulative dividend, it covers the amount which would have been paid in past

(1) [1920] 2 Ch. 205, 216.

years if there had been profits available, but which was not paid because there were no such profits: *In re Taylor's Trusts* (1); *In re Sale* (2); *In re Grundy.* (3) It is submitted that the 3150*l.* is "net annual produce," which, under the terms of the will, goes to the tenant for life: *In re Lysaght.* (4) The dividend when paid—not being in any true sense in arrear up to that moment—is paid out of the fund then made available for its payment for the year in which it is paid. It is not paid in respect of any previous period of non-payment when it was neither due nor payable: *In re Wakley.* (5)

Courthope Wilson K.C. and *Ashworth James* for the remaindermen. This sum of 3150*l.* forms part of the estate of the testatrix. The tenant for life is entitled to the annual produce of the estate. Annual produce is something which occurs de anno in annum. This is a capital sum attached to the preference shares by the resolution of September 5, 1922. As soon as the profits are earned, if not carried to reserve, the shareholders have a right to nine-tenths of the profits. It is a vested chose in action and there is no necessity to wait for a dividend to be declared. The payment in respect of the 7*l.* is the redemption of a capital charge, the result of a bargain between the two classes of shareholders made in order to pass the reduction scheme. The payment was in respect of the sum of 7*l.* per share contingently owing to the testatrix at the time of her death. The right to receive payment came into existence in 1918 under the special resolution which conferred a right to 7*l.* per share in respect of past cumulative dividends unpaid up to July 31, 1918, a period wholly within the lifetime of the testatrix. In *In re Wakley* (5) the shareholders had no rights until there was a determination by the directors to distribute. The 1*l.* 17*s.* 6*d.* here is not a dividend but a payment on account of an agreed sum which is one of the rights attached to the preference shares, and is not dependent on the directors'

(1) [1905] 1 Ch. 734.
(2) [1913] 2 Ch. 697.
(3) (1917) 117 L. T. 470.
(4) [1898] 1 Ch. 115.
(5) [1920] 2 Ch. 205, 226.

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decision to distribute. Here under the new Article 114 the words are "the profits of the company . . . . shall be applicable . . . . in payment of the said arrears."

RUSSELL J. The question is whether the sum of 3150*l.* paid by Meux's Brewery Company to the executors of the will of the testatrix belongs, wholly or in part, to the person entitled under the will as tenant for life, or whether the sum belongs, wholly or in part, to the corpus of the residuary estate. Under the new art. 114, which was passed in 1918 [His Lordship read the Article], the preference shareholders have a right to be paid a fixed cumulative dividend of 10*s.* per share from the profits, and they are also entitled, when certain conditions are fulfilled, to share further in any profits to the extent of 7*l.* for each share, the sum of 7*l.* being arrived at by taking into consideration the number of years in the past when the company had failed to make sufficient profits to pay the 5 per cent. cumulative preference dividend. During her life the company paid to the testatrix 3*l.* 5*s.*, per share, in respect of the sum of 7*l.* In 1922 a further payment of 1*l.* 17*s.* 6*d.* per share was made to the executors of the testatrix in pursuance of the resolution passed on September 5, 1922.

In these circumstances who is entitled to the sum of money so paid? Is the tenant for life entitled to it as part of the income produced by the residuary estate, or should it go to corpus and be added to the capital of residue? In my opinion the tenant for life is entitled to it.

The point is not covered by *In re Wakley* (1), but the views which the members of the Court of Appeal there expressed are of assistance in this case. *In re Wakley* (1) was a case of a company which had in years past failed to declare a preference dividend and then, in more prosperous times, there being dividends unpaid in respect of the previous years amounting to *xl.*, a dividend was declared of *xl.* plus the dividend for the particular year in question. The

(1) [1920] 2 Ch. 205.

Court of Appeal held that the dividend was not three dividends but one, and that for the year in which it was declared, although its amount was conditioned by the fact that in previous years no dividends had been paid. Under the present Articles of the company the preference shareholders are entitled to be paid out of profits a cumulative preference dividend of 10*s.* per share in addition to a sum of 7*l.* per share. During her life the company paid to the testatrix 3*l.* 5*s.* in respect of the 7*l.* At her death, in August, 1920, she had a contingent right to have the balance of 3*l.* 15*s.* paid to her out of the profits of the company. The right was contingent not only on the making of profits but also on those profits not being carried to reserve. When the contingency happened the shareholder then entitled to the share is entitled to the money in satisfaction of that right which from being contingent has become absolute. It appears to me that the language of Warrington L.J. in *In re Wakley* (1), with suitable adaptation to the present case, is eminently applicable. He says: "In fact the shareholder has no right to a dividend, whether cumulative or otherwise, until there are profits available, and the company by the proper authority has determined to distribute them." So here the testatrix had no right to this 7*l.* interest in the share of profits until there were profits available in the sense that I have already described. The learned Lord Justice then continued: "It follows that when profits are available and the company determines to distribute them it is the shareholder who is then entitled to the shares who takes the dividend, and not the person entitled to them in past years, though the dividend may in the case of cumulative dividend be large enough to cover the amount which would have been paid in past years if there had been profits available, but which was not paid because there were no such profits." In my opinion the 3150*l.* is income which, becoming payable for the first time in 1922, and being in fact paid in that year, the tenant for life is, under the will, entitled to as income of the residue

(1) [1920] 2 Ch. 205, 222.

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of the estate for that year, or, to use the words of the will, "net annual produce arising from" the unconverted estate.

Solicitors: *Farrer & Co.; Holloway, Blount & Duke.*

J. B. B. M.

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Feb. 21, 22; *March* 8.
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June 7, 12.

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[1921. K. 958.]

Vendor and Purchaser—Interest in Land—Specific Performance—Memorandum in Writing signed by the Party to be charged—Unauthorized Alteration of Memorandum—Subsequent Ratification—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

On July 14, 1921, the solicitors of the plaintiff and the defendant attended to exchange duplicate parts of a contract for the sale of two houses by the defendant to the plaintiff and his wife. The part signed by the plaintiff contained his name only as the purchaser. Without authority the defendant's solicitor struck out the name of the plaintiff's wife in the part signed by the defendant, who afterwards ratified his action and instructed him to proceed with the contract. The title was accepted and a draft assignment prepared and approved by the defendant's solicitor. On July 26, 1921, defendant's solicitor wrote to plaintiff's solicitor a letter headed "Sweet to Koenigsblatt"—"Herewith replies to requisitions. I understood that vacant possession could be given and the contract was drawn accordingly. The vendors now state that vacant possession cannot be given and, further, that the purchaser does not expect or require it."

The defendant refused to complete, and in an action for specific performance he pleaded the Statute of Frauds:—

Held, by the Court of Appeal, affirming the decision of Russell J., that the ratification related back to the time when the acts were done, and that on July 14 it was as if defendant's solicitor had in his possession a document with alterations, signed by the defendant after they were made, and with authority to hand it over as part of an operative agreement in return for a similar document signed by the plaintiff; and that the Statute of Frauds raised no difficulty, as the plaintiff was suing on an agreement signed by the parties.

Per Russell J., *semble*, the letter of July 26, 1921, signed by the defendant's solicitor, was a sufficient memorandum to satisfy the statute, because he had express instructions to carry out the contract and therefore authority to affirm on behalf of his client the contract he was instructed to carry out.

The principle of *Stewart* v. *Eddowes* (1874) L. R. 9 C. P. 311 applied.

WITNESS ACTION.

In this action the purchaser sued the vendors for specific performance of an agreement for the sale of two leasehold houses. The defendants, Maurice Sweet and his wife, had no defence except the Statute of Frauds. Maurice Sweet, who was authorized to act for his wife, is referred to as the defendant. As to the relevant facts there was no dispute. Early in July, 1921, the parties were at one. A draft contract had been engrossed, and was ready for signature, but the parties differed on the question to whom the deposit should be paid, and negotiations were broken off. The draft contract which had been engrossed was a contract under which the vendors sold to the plaintiff and his wife. Part of the purchase money was to remain on mortgage, and the draft contract provided for the execution of a mortgage with covenants for payment by the plaintiff and his wife. Messrs. Edell were acting as solicitors on behalf of the purchasers; Mr. Brooks was acting for the vendors, his managing clerk, Mr. Roe, having complete charge of the matter.

On July 7, 1921, the defendant Maurice Sweet instructed Mr. Roe to reopen negotiations. The clause as to the deposit was altered in the engrossment by making the deposit payable to a bank, and Maurice Sweet signed on behalf of himself and his wife the engrossment thus altered, and left it with Mr. Roe.

The engrossment so signed was dated July 7, 1921, and still contained the names of the plaintiff and his wife as purchasers. The date of completion in clause 8 was left blank; there was also a blank in clause 9 which would be automatically filled in when the date for completion was supplied. Mr. Roe thereupon got into communication with Messrs. Edell, and a correspondence passed. On July 7 Mr. Brooks wrote to Messrs. Edell: "I have now received instructions from Mr. Sweet to reopen negotiations on the basis of the deposit being paid to Barclays Bank, Upton Park, as stakeholders. Mr. Sweet has signed the contract on behalf of himself and Mrs. Sweet altered as above. Perhaps you will kindly take your clients' instructions as to whether they are willing to

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reopen the matter." That was answered by a letter of July 13, which contained various new provisions which were sought to be stipulated for by Messrs. Edell, and those were waived by a letter of July 13 from Messrs. Edell to Brooks: "Referring to our letter to you of yesterday's date and our conversation with you on the telephone to-day, note our client waives the conditions set out in our letter and has signed the contract. We can exchange at any time. Please let us have an assurance that no notices have been served by the lessor, sanitary or other authority." On July 14 Mr. Roe attended at Messrs. Edell's offices for the purpose of exchanging duplicate parts of the contract. The part signed by the plaintiff produced by Messrs. Edell contained only the name of the plaintiff as sole purchaser. Mr. Roe assented to this alteration. He altered the document which the defendant had signed by striking out the name of the plaintiff's wife, and making the necessary consequential alterations. The blanks in clauses 8 and 9 were filled in, and an alteration was made in clause 2. The document so altered with the defendant's signature at the foot was handed over to Messrs. Edell in exchange for a similar document signed by the plaintiff.

Mr. Roe in his evidence said that he considered he had authority to alter the document from a contract for sale to two purchasers into a contract for sale to the plaintiff alone. He said that the defendant had told him during the previous negotiations that he did not care whether the plaintiff's wife was a party or not—"She is nothing."

On July 19, 1921, the defendant saw Mr. Roe, who pointed out the alterations which he had made in the document. The defendant said the deletion of the plaintiff's wife was immaterial, and again repeated "She is nothing." He approved the other alterations, but said he had got a better offer for the property and wished to get out of his contract; he would think it over.

On July 21, 1921, he instructed Mr. Roe to proceed with the contract with the utmost despatch. The matter proceeded. Requisitions were delivered; Mr. Roe went through them

with both the defendants. The title was accepted, and a draft assignment was prepared by Messrs. Edell and approved by Mr. Roe.

On July 26, 1921, the defendant's solicitor wrote to the plaintiff's solicitor the following letter :—

26 July, 1921.

SWEET TO KOENIGSBLATT.

Dear Sir,

Herewith replies to requisitions on title. Referring to requisition ten it is a fact that as at first instructed I understood that vacant possession could be given and the contract was drawn accordingly. The vendors now state that vacant possession cannot be given and further that the purchaser does not expect or require it. I shall be glad to hear from you confirming this.

Yours faithfully,

RICHARD BROOKS.

Messrs. Edell & Co.

Eventually the defendant declined to proceed and this action was brought.

The action came on for hearing before Russell J. on February 21, 1923.

G. B. Hurst K.C. and *J. F. Carr* for the vendors. There was no contract on July 14, as Roe had no authority to make a contract with one purchaser only, and therefore there is no agreement or memorandum in writing to satisfy the Statute of Frauds. Where a memorandum in writing is to be proved as a compliance with the statute it differs from a contract in writing in that it may be made at any time after the contract if before action commenced. The memorandum is one of an already existing contract : *Sivewright* v. *Archibald* (1) ; *In re Holland.* (2) The statute was not meant to affect contracts in any way but only the evidence of them : *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs.* (3) Once there is a complete contract further negotiations between the

(1) (1851) 20 L. J. (Q. B.) 529. (2) [1902] 2 Ch. 360, 375.
(3) (1890) 44 Ch. D. 616, 621.

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parties cannot, without the consent of both, get rid of the contract already arrived at: *Bellamy* v. *Debenham* (1); *Perry* v. *Suffields, Ld.* (2) The statute requires that a concluded agreement, existing at the time when the memorandum is signed, should be proved: *Munday* v. *Asprey.* (3) Even if the defendant on July 21, 1921, ratified Roe's act, new terms were by that ratification introduced into the old contract, thus making a new contract to which there was no signature by the party to be charged. The only signature was to the old contract.

Preston K.C. and *MacSwinney* for the plaintiff. Roe had authority to make the alterations on July 14, and therefore the documents exchanged on that date constitute a written agreement signed by the parties just as if the alterations had been made before the defendant signed. *Munday* v. *Asprey* (4) is inconsistent with the other authorities. In *Bluck* v. *Gompertz* (5) the effect of an alteration in a guarantee, signed before the alteration, was considered, and it was held that "words introduced into a paper signed by a party, or an alteration in it, may be considered as authenticated by a signature already on the paper, if it is plain that they were meant to be so authenticated." If A. makes a proposal in writing to B., who alters the terms, and A. afterwards assents to that alteration, B. can sue A. on the altered contract and rely upon his signature to satisfy the statute. The point of time to look at with respect to the condition of a document is the time when it becomes an agreement. Any previous alteration is not within the rule forbidding the alteration of a written document, for such an alteration is merely the alteration of a proposal: *Stewart* v. *Eddowes.* (6) On July 19 the alterations were pointed out to Sweet, who approved of them, and on July 21 he instructed his solicitor to proceed with the contract. That brings this case exactly within *Stewart* v. *Eddowes* (6), although that was a decision under s. 17 of the statute. As was said by Lord

(1) (1890) 45 Ch. D. 481, 493.
(2) [1916] 2 Ch. 187, 192.
(3) (1880) 13 Ch. D. 855, 857.
(4) 13 Ch. D. 855.
(5) (1852) 7 Ex. 862, 868.
(6) (1874) L. R. 9 C. P. 311, 314.

Coleridge in that case "there was no contract between the parties until the proposal was submitted to Stewart, and Stewart on meeting Eddowes agreed that his handwriting should operate as a signature to what then became a complete agreement between the parties."

So here, although the memorandum of July 7, if nothing else had taken place, would have been evidence of a complete agreement, the parties themselves have shown that the agreement was not complete by altering the terms in a material particular which kept the whole matter of purchase and sale in a state of negotiation only until Sweet, by assenting, on July 19, to the alterations made on July 14, agreed that his handwriting should operate as a signature to what then became a complete agreement between the parties. A ratification of a contract by a principal relates back to the time when it was made by the agent: *Maclean* v. *Dunn*. (1) Verbal ratification is sufficient: *Soames* v. *Spencer*. (2) In the letter of July 26 signed by the defendant's solicitor there is reference to "the contract made accordingly," that is, the contract of July 14. It was within the scope of the solicitor's authority to admit the contract of July 14, because he was authorized to carry out the contract made on July 14, and approved by his client on July 19, and his signature is sufficient to satisfy the statute: *North* v. *Loomes*. (3)

Cur. adv. vult.

March 8. RUSSELL J. At one time the authority of Maurice Sweet to act for his wife was disputed, but it was eventually conceded that in everything he did in this matter he had complete authority to act for and bind his wife. I shall therefore treat the matter as though Maurice Sweet was the sole vendor and the sole defendant. It is said that there is no agreement in writing, or memorandum in writing, to satisfy the Statute of Frauds, because there was no contract at all on July 14, 1921, as Roe had no authority to make a

(1) (1828) 1 Moo. & P. 761. (2) (1822) 1 Dow. & Ry. 32.
(3) [1919] 1 Ch. 378.

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contract with one purchaser only ; and that even if there were such a contract, because the defendant on July 21, 1921, assented to the elimination of the plaintiff's wife, there was no signed memorandum to satisfy the Statute of Frauds, because to satisfy the statute the memorandum must record the terms of a contract existing when the memorandum is signed.

The plaintiff, on the other hand, contends that Roe was authorized to make the alterations which he made on July 14, 1921, and that accordingly the documents exchanged on that date constitute a written agreement signed by the parties, in exactly the same way as if the alterations had been made before the defendant signed. They further say that even if there was no authority in Roe to make the alterations his unauthorized act was completely adopted and ratified by the defendant on July 21, 1921.

The case is a difficult one, and there is no authority directly in point ; but on consideration I think the plaintiff is right. The true position appears to me to be this : on July 7 the defendant was going away, but he wished negotiations to be resumed, and an agreement come to. He signed a document with certain blanks, and left it with his agent Roe to be handed over as one part of an operative contract in writing in exchange for a similar document signed by two persons, who were to be the other parties to the written contract, his agent Roe having authority to fill in the blanks. On July 14 Roe not only filled in the blanks, but he struck out the name of one of the two purchasers. If he had authority to do that, then a complete contract in writing existed on that day contained in the two documents exchanged, each signed by the appropriate party. On the evidence, however, Roe had not in my opinion authority to alter the document over the defendant's signature by striking out the name of one purchaser. It is true that on the evidence the defendant did not care whether the plaintiff's wife was joined or not. It is also true that at the trial the plaintiff offered that his wife should be joined as a purchaser. The defendant is entitled to stand on his strict rights, and to say that he had not on July 14 given any authority for her exclusion, and

to refuse the offer made at the trial. What Roe did on July 14 in excess of his authority was to accept on behalf of the defendants the offer made by the plaintiff to purchase on the same terms as those on which the defendants were willing to sell to the plaintiff and his wife, and to exchange written agreements for such purchase and sale, using for this purpose the document signed by the defendant, but with alterations made in it since signature. These unauthorized acts of Roe could have been repudiated by the defendant, or they could be ratified and adopted by him. After consideration he told Roe to proceed with the contract; in other words, he adopted the acts of Roe and ratified them. This ratification relates back to the time when the acts were done, and accordingly the position is just as if on July 14, 1921, Roe had in his possession a document containing all the alterations, but signed by the defendant after the alterations had been made, with authority to hand it over as one part of an operative agreement in writing in exchange for a similar document signed by the plaintiff, and had exchanged the two documents accordingly.

In this view of the case no difficulty arises under the Statute of Frauds. The case is one in which the plaintiff sues on an actual agreement in writing signed by the parties. Although there is no authority directly in point, the view which I have formed receives support from the cases of *Soames* v. *Spencer* (1); *Maclean* v. *Dunn* (2); *Bluck* v. *Gompertz* (3); and *Stewart* v. *Eddowes*. (4)

It is unnecessary to decide whether the plaintiff could successfully rely on any of certain other documents, any one of which he claimed in any view to be a sufficient memorandum within the Statute of Frauds. Suffice it to say that the case of *North* v. *Loomes* (5) affords grounds for the view that the letter of July 26, 1921, signed by Mr. Brooks, is a sufficient memorandum. Mr. Brooks, through Mr. Roe, had express instructions to carry out the contract, and

(1) 1 Dow. & Ry. 32.
(2) 1 Moo & P. 761.
(3) 7 Ex. 862.
(4) L. R. 9 C. P. 311.
(5) [1919] 1 Ch. 378.

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therefore authority to affirm on behalf of his client the existence and validity of the contract he was instructed to carry out. The words in the letter, "the contract," mean in my opinion either the contract as contained in the documents exchanged on July 14, 1921, or the documents originally drawn, but altered and exchanged as a contract on that date.

The result is that the plaintiff succeeds, and is entitled to an order for specific performance on the footing of the title having been accepted. The form in Seton at p. 2179 may be followed with the necessary variations.

J. B. B. M.

C. A.

The defendants appealed. The appeal was heard on June 7 and 12, 1923.

G. B. Hurst K.C. and *J. F. Carr* for the appellants. The only question is whether there was a sufficient memorandum to satisfy s. 4 of the Statute of Frauds, and it is submitted that there was not.

It is admitted that on the finding of the learned judge Roe's authority extended to making all necessary alterations in the document.

All that the appellants physically signed was an offer which has never been accepted.

The respondent cannot rely upon a document signed by the appellants for a purpose different to that for which it was signed.

Russell J. relied on *Soames* v. *Spencer* (1) and *Maclean* v. *Dunn* (2), but those were different cases.

Bluck v. *Gompertz* (3) was a case of correcting a mistake in the document. It was there held that a mistake in a guarantee could not be corrected without altering the document itself, otherwise the parties might defeat the object of the statute, which was to exclude parol evidence, by requiring evidence in writing of the contract.

In *Stewart* v. *Eddowes* (4) there was no question of agency.

(1) 1 Dow. & Ry. 32, 34.
(2) (1828) 4 Bing. 722.
(3) 7 Ex. 862, 866.
(4) L. R. 9 C. P. 311.

The Court there held on the facts that there had been an authentication of the original signature.

[LORD STERNDALE M.R. It may be argued that *Stewart* v. *Eddowes* (1) is wrong, but I see great difficulty in distinguishing it.]

It is distinguishable upon the facts. In that case the document was signed by Stewart. Alterations were then made in it and it was sent back to Eddowes, who assented to them. Here Sweet never saw the document again after the alterations had been made. Under the circumstances he was no doubt bound by agreement, but the statute has not been complied with. The contract which he signed was different from that to which he ultimately agreed and the contract as altered required his signature.

Where a contract is alleged as of a specific date the contract must be in existence when the signature is attached. The effective signature here must have been in existence on July 14.

In *Munday* v. *Asprey* (2) it was held that a letter from an alleged purchaser inclosing and referring to a draft conveyance in which it was recited that he had agreed to purchase land was held not to be a memorandum of a completed agreement.

To satisfy the statute there must be a co-existing memorandum and signature. The signature to the memorandum in writing must be affixed to the document with a definite intention of making a binding contract.

Acknowledgment is only effective as amounting to subsequent signature.

[WARRINGTON L.J. The signature need not be written for the purpose of authenticating the document if it in fact does so.]

It must be intended to authenticate the document to which it is put.

Preston K.C. and *MacSwinney* for the respondent were not called upon to argue.

June 12. LORD STERNDALE M.R. stated the facts and continued: This is no doubt, as Russell J. said, a

(1) L. R. 9 C. P. 311. (2) 13 Ch. D. 855.

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somewhat difficult case; and there is no authority quite directly in point. There is an authority—I think I may say there are authorities that point in the direction in which I think the case should be decided. I think the learned judge's judgment was right, and should be affirmed. I hope I am not in any way influenced in coming to that conclusion by the wholly unmeritorious character of the appeal. It is perfectly obvious, and has been frankly stated by the learned counsel who argued the case, that the defence is a pure technicality by which the defendant wishes to get out of a contract which he had undoubtedly made and approved, because he thought he could make more money by repudiating it than by fulfilling it. The question is whether the document, altered by Mr. Roe at his interview with Mr. Koenigsblatt's solicitor, is a memorandum of the agreement signed by the defendant. Although there is no case exactly in point, I think the principle of *Stewart* v. *Eddowes* (1) does apply. As Brett J. said in that case: "if the document was to be taken as it then appeared, it was conclusive against Stewart"; so here this document produced contains all the terms of the contract, and is admittedly signed by the defendant; therefore, on the face of it, without any evidence, it is conclusive against him. But he says: "I contend that the evidence shows that the signature was not a signature to the memorandum of the contract; it was a signature to something else." It seems to me that if that contention be good, really the question of the striking out of Mrs. Koenigsblatt's name is immaterial, because every alteration that was made, whether with the defendant's authority or not, in the document as originally signed by him, is just as important as the striking out of Mrs. Koenigsblatt's name. The filling in of the date of completion, and the other date, was done with the defendant's authority, but after signature; and if the contention be right, there is no signature to any memorandum containing those terms. I think that the alteration by striking out Mrs. Koenigsblatt's name is just in the same position, because

(1) L. R. 9 C. P. 311, 314.

it was, in my opinion, undoubtedly ratified by Mr. Sweet. He was told of it, and he approved of it; and I think it is settled law now, that when once you get a ratification it relates back; it is equivalent to an antecedent authority: mandato priori æquiparatur; and when there has been ratification the act that is done is put in the same position as if it had been antecedently authorized. Therefore, all the alterations made by Mr. Roe seem to me to stand upon the same footing. The defendant on the evidence does not prove that his signature is attached to something to which he did not agree. He only proves it to be attached to something to which he did agree, but he says the signature was attached before he agreed, and therefore, as he did not sign it over again, there is no memorandum of the agreement signed by him or his agent. Now, as I say, the principle of *Stewart* v. *Eddowes* (1) seems to me to come very near this. I quite agree the circumstances are different. *Stewart* v. *Eddowes* (1) was a much simpler case, but I am inclined to think that if the argument for the appellants here is right, *Stewart* v. *Eddowes* (1) is wrong. I do not think the difference in facts is enough to make a difference in the principle of the two cases. In *Stewart* v. *Eddowes* (1) what happened was this. The person to be charged signed the document; the document was sent to Stewart first, and was signed by him, and was returned to the other party, who made alterations in it. It then came back to Stewart, who struck out the alterations and sent it back again. When the other party wished to enforce the contract Stewart said, "There is no memorandum in writing signed by me." The Divisional Court, consisting of Lord Coleridge C.J., Brett and Denman JJ., rejected that contention; and Lord Coleridge, after stating the facts, said: "It is now suggested that evidence is not admissible to shew that Stewart acquiesced in the striking out of the interlineations in red ink or the insertion of the others, on the ground that that would be to vary the contract by parol. This contention appears to me to be a fallacy. There was no variation of the contract, for

(1) L. R. 9 C. P. 311.

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there was no contract between the parties until the proposal was submitted to Stewart, and Stewart on meeting Eddowes agreed that his handwriting should operate as a signature to what then became a complete agreement between the parties. There was no evidence to vary the terms after the agreement became an agreement, but only evidence to shew what the agreement was to which the parties agreed when they signed or acknowledged their signatures." Brett J. says: "In this case the vendors relied on a written agreement, and produced a paper at the bottom of which the name of Mr. Stewart was written as a signature. If the document was to be taken as it then appeared, it was conclusive against Stewart; but it was alleged on his behalf, that the paper was not in the condition in which it appeared at the time when it became an agreement; that the interlineations in red ink had not been struck out when he signed it. To that it is replied by Eddowes, that though that was the case, at the time when Stewart signed there was no agreement, but that afterwards it was agreed by Stewart that the paper in its present condition should be the agreement signed by him. It is true that a written agreement cannot be varied by parol. If by that is meant that you cannot shew that the document was different in any respect from that which it appears to be at the trial, Mr. Benjamin's argument must fail. But it is clear that the real point of time to look at with respect to the condition of the document is the time when it became an agreement. Any previous alteration does not come within the rule which forbids the alteration of a written document, for such an alteration is merely the alteration of a proposal for an agreement. Here, when the document was first written, it was a mere proposal; when it was given to Eddowes and sent to Glasgow it was a mere proposal; when it came back to Liverpool it was a counter-proposal only. There was no agreement until Eddowes and Stewart met and agreed that the signature should be signatures to the agreement. The evidence here was admissible to shew, not what was agreed to, but what was the condition of the paper when the parties agreed that it should be an agreement

between them." I quite accept what is said by the learned counsel that the facts here are not the same. To make the facts exactly the same the document, which had been altered by Mr. Roe and left with Mr. Koenigsblatt, should have been taken back to Mr. Sweet. Mr. Sweet should have seen that document and said: "Oh, yes; that is all right." That would make the facts the same. If those were the facts, it would be exactly within the four corners of this decision. But that did not take place; the document itself was never brought back; but I am satisfied, as was the learned judge upon the evidence, that Mr. Sweet was told, not only that an alteration had been made in the part signed by Koenigsblatt, but that the alteration had been made, as Mr. Roe says, "in the contract"; that is, in both parts. Therefore, when he said to his agent, Mr. Roe, that he approved of the alterations as they appeared not only in the part signed by Koenigsblatt, which he had before him, but in the one that was signed by him, which he knew to be in Koenigsblatt's possession, he recognized his signature as attached to the document containing those alterations. It seems to be admitted that if, on approving the alterations, the defendant had said to Mr. Roe: "All right, go and get that document," and Roe had got the document and brought it back to the defendant, who thereupon had looked at it and said: "Now take it back again, it is all right," the case would be on all fours with *Stewart* v. *Eddowes* (1); and I can see no difference whatever between the case where, knowing the alterations are in the document which the other party has, he approves that and says in effect, "Let it stay there," and does let it stay there as a memorandum of the contract, and a case where he had looked at it and said: "Oh yes, that is all right; take it back again." For these reasons I think that there is here a memorandum signed by the defendant, and the decision of the learned judge is right, and the appeal should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. This is an action by the purchasers of certain land for specific

(1) L. R. 9 C. P. 311.

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performance of an agreement for the sale to them of that land; the only defence is that there was no sufficient memorandum of the agreement signed by the party to be charged; that is, by the vendor. Now in fact there was produced, as the contract sued upon, a formal written document signed by the defendant, Maurice Sweet, on behalf of himself and his wife, the co-defendant; but it is said that is not a memorandum of the agreement duly signed by the vendor, because his actual signature to the paper was affixed before it took the precise form which it now takes. Now the fact is this: that on July 7, 1921, he signed a document purporting to be a contract for the sale by him and his wife to the plaintiff, Maurice Koenigsblatt, and Toni, his wife, of the land in question. Certain alterations had been made in the document before he signed it; the only material one being a provision that the deposit should be paid to Barclays Bank instead of to the vendor's solicitor. The document had that provision in it when it was signed by the vendor. The document, so signed, was given by the vendor to the managing clerk of his solicitor, who had the conduct of the matter, to be exchanged with the purchaser, and accordingly Mr. Roe, the managing clerk in question, and the purchasers' solicitor met; and at that interview the purchasers' solicitor stated that he desired the contract should be made with Mr. Maurice Koenigsblatt alone, and that his wife should be left out of the matter. Mr. Roe, not then having the vendor's authority, but intending to obtain ratification afterwards, agreed provisionally to that proposal; and the necessary alteration was made in the document, and certain blanks were filled in; the counterpart, so altered, was signed by the purchaser, or the purchaser's solicitor on his behalf, and Mr. Roe took it away with him, leaving the document signed by the vendor, with the alterations in it, with the purchaser's solicitor. He afterwards saw the vendor, Maurice Sweet, and he pointed out to him the alterations which had been made in the contract. Those alterations were approved by the vendor, and he directed Roe to go on carrying out the contract so made. Now, no agreement was made at all, until the action

taken by Mr. Roe at his interview with the purchaser's solicitor was ratified and approved by the vendor; that was the time at which the contract was made; and at that time he, to my mind, not only approved of the alterations, but, in effect, agreed that the document signed by him, on the previous occasion, should be a memorandum of that contract; and we, as a Court, are drawing I think the same inference that was drawn by the Court in *Stewart* v. *Eddowes* (1), that the acceptance of the alterations, the ratification of what had been done by Mr. Rowe, carried with it an acceptance of the signature as being a signature to the memorandum of that agreement, which was then made for the first time. Now I should myself be prepared, without the authority of *Stewart* v. *Eddowes* (1), to have come to the conclusion arrived at by the learned judge, that in such a case there was a memorandum of the agreement signed by the person to be charged. But if authority is wanted, I think it is to be found in the principles acted upon in *Stewart* v. *Eddowes* (1) to which I have already alluded. The only distinction which is of any import between the two cases is: that the piece of paper, which had there been signed by the person to be charged, was shown to him with the alterations in it, and accepted by him as being the agreement; but that, with all respect, seems to me to be a distinction without a difference. The vendor here was told that the alterations had been made in the contract, that is to say, the contract consisting of two documents: one signed by the vendor, and one signed by the purchaser. The alterations had been made in both documents, and he accepts those alterations as binding upon him, and it seems to me idle to suggest that, as Mr. Roe did not actually send to the purchaser for the bit of paper bearing his signature, but put before him the corresponding piece of paper bearing the purchaser's signature, that can make any material difference. In *Stewart* v. *Eddowes* (1) what had happened was this: there a document had been signed by Stewart, who in that case was the person to be charged. That document had not

(1) L. R. 9 C. P. 311.

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been prepared by him, it had been prepared by the other parties to what was, then, an intended contract, a contract for which the negotiations were proceeding. Stewart made alterations in it, and signed the document as altered. Then he took it to the purchaser or his broker; he forwarded it to the vendor, telling him, at the same time, it never would be agreed to in that form. Then that was altered by the vendor, and sent back to Liverpool, where Stewart lived. Now comes the material thing. It was then signed on behalf of the vendor who took it to Stewart who acquiesced in the alterations made by the vendor, and approved of the agreement as signed by him. It was then for the first time that an agreement was made. So here, the agreement was made for the first time when the alterations made in the document were accepted by the vendor, Sweet. Now what the learned judges said in that case was this: there was no contract between the parties until the proposal was submitted to Stewart; Stewart, on meeting Eddowes, agreed that his handwriting operated as his signature, and that then became a completed agreement between the parties. According to the facts as stated, the agreement that his signature should operate as the signature to an agreement between the parties, was inferred from the fact that Stewart accepted the alterations which had been made by the other side. So here, I have no hesitation in inferring from what took place between Mr. Roe and the vendor, that the vendor agreed that the signature which he had affixed to the previous document should be his signature to the agreement then for the first time arrived at. I think this case comes within the principle of *Stewart* v. *Eddowes* (1), and that the judgment appealed from was right, and that the appeal must be dismissed with costs.

YOUNGER L.J. I am of the same opinion. The Statute of Frauds in s. 4 introduces an element of technicality into the effective conclusion, for all purposes, of certain agreements mentioned in the section. For my own part I have no desire

(1) L. R. 9 C. P. 311.

to be any party to a process, which at one time was not uncommon, of attempting to whittle away that section. I think that so long as the section is allowed by the Legislature to remain in force, its provisions must be enforced, irrespective of consequences in the particular case. I think, however, that in this case, it is, on the facts, shown that the statute, and that section of the statute, has been complied with. That conclusion is based, to my mind, entirely upon the effect of the evidence of Mr. Roe with reference to the interview which he had with the defendant on July 19; and I think that the true result of his evidence with reference to this interview (somewhat vague in the critical points, as I agree it is) must be taken to be that the signature of the defendant to the document in its then existing form was, in effect, ratified and acknowledged by him to Mr. Roe at that interview. I am not unconscious of the fact that after stating, as Mr. Roe does, that the defendant approved the alteration which he had made in what he calls the contract, he goes on at once to say: "The defendant then stated that he had a better offer for the property and wanted to get out of his contract. I explained the legal position, and he said he would think it over and send further instructions." It is, of course, a little peculiar that the contract had been concluded by the interview with his own solicitor only a moment before the defendant informed his solicitor that he desired to get out of it; and also it is, perhaps, a little unfortunate that Mr. Roe did not condescend to give the explanation of the legal position which he gave to the defendant, when the defendant intimated his desire to get out of the contract in question. But I cannot read the evidence as a whole in any sense other than this: that the contract which Mr. Roe there refers to was, in his mind, at that moment a concluded contract, and that the negotiation, which was for the moment suspended, could not have been effectively stopped had the purchasers thought fit to enforce their agreement. Accordingly, although there are doubts suggested by the somewhat vague terms of Mr. Roe's evidence in two critical matters, I have arrived, with my Lord and the Lord Justice, at the conclusion that

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the result of what happened at that interview was that the defendant must be taken to have ratified and acknowledged his signature to the memorandum in its then state. The result is that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Sterns.*
Solicitors for the respondent: *Edell & Co.*

G. A. S.

P. O. LAWRENCE J. 1923 *May* 14, 17.

In re ROBINSON.

WRIGHT *v.* TUGWELL.

[1889. R. 1854.]

Will—Charitable Legacy—Endowment of Evangelical Church—Black Gown in Pulpit—Continuing Condition—Condition Subsidiary to main Charitable Object—Impracticability—Scheme—Dispensing with Condition.

A testatrix, who died in 1889, bequeathed 1500*l.* towards an endowment for a proposed evangelical church at Bournemouth, provided certain conditions were carried out. An action was commenced for the administration of her estate, and on the further consideration thereof on November 3, 1891, it appeared that amongst other conditions (which mainly related to the conduct of the services) it was made an "abiding condition" that the black gown should be worn in the pulpit, unless there should be an alteration in the law rendering it illegal. It further appeared that in compliance with the conditions a church had been erected at Bournemouth and the other conditions laid down by the testatrix fulfilled, except the condition as to wearing a black gown, which condition was held by North J. to be a continuing condition, but not an illegal one; and accordingly, the fund was carried over to the credit of the action, the separate account of "the 1500*l.* endowment fund for the proposed Bournemouth church," with liberty for the incumbent and all persons interested to apply as to the capital or income thereof: see [1892] 1 Ch. 95; [1897] 1 Ch. 85.

This petition was presented by the present incumbent asking that under a scheme or otherwise the fund in Court might be transferred to the Ecclesiastical Commissioners. Evidence was adduced that the use of the black gown in the pulpit was practically unknown in the diocese of the new church, and that its use was calculated to alienate the congregation and to defeat the main objects of the testatrix, namely, the teaching and practice of evangelical doctrine and services:—

Held, that the condition requiring the wearing of a black gown in the pulpit was subsidiary to the main charitable object, namely, the endowment of an evangelical church at Bournemouth, and that as the performance thereof had been shown to be impracticable the condition might be dispensed with and the fund be transferred to the Ecclesiastical Commissioners as part of the endowment of the church so erected as aforesaid.

PETITION.

Frances Rebecca Robinson by her will dated July 31, 1889, bequeathed 1500*l.* towards the endowment of a proposed evangelical church at Bournemouth to be placed in Peach's Trust and Disney Robinson advowson, provided certain conditions therein referred to were carried out; and the testatrix appointed Colonel Wright sole executor of her will.

The testatrix died on August 27, 1889, and soon afterwards the above action was commenced for the administration of her estate. On the further consideration of that action on November 3, 1891, it appeared from the chief clerk's certificate made in answer to inquiries directed as to the trusts of the said fund, that, amongst the conditions referred to in the will were the following: that endeavour should be made to get a like sum contributed by the Ecclesiastical Commissioners, that the services in the new church should be in accordance with sound evangelical doctrine and of the sound simple character laid down for the Reformed Protestant Church of England; and it was made an "abiding" condition that the black gown should be worn in the pulpit, unless there should be an alteration in the law rendering it illegal. It appeared, further, that in compliance with the conditions the church of St. John the Evangelist had been erected in Bournemouth and the patronage thereof had been assigned to the Peach trustees, and the other conditions laid down by the testatrix fulfilled, except the condition as to wearing a black gown, which condition was held by North J. to be a continuing condition, but not an illegal one; and accordingly, the fund was carried over to the credit of the action, the separate account of "the 1500*l.* Endowment fund for the proposed Bournemouth Church," with liberty for the

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incumbent and all persons interested to apply as to the capital or income thereof (1)

In 1896 an application by the then incumbent for payment to him of the accumulated dividends and future dividends was refused by North J., and on appeal his decision was affirmed, the question whether a scheme dispensing with the condition as to the wearing of a black gown could be sanctioned by the Court being left open. (2)

This petition was presented by the present incumbent asking that under a scheme or otherwise the fund in Court might be transferred to the Ecclesiastical Commissioners. Evidence was adduced that the use of the black gown in the pulpit was practically unknown in the diocese in which the new church was situate, and that its use was calculated to alienate the congregation and to defeat the main objects the testatrix had in view—namely, the teaching and practice of evangelical doctrine and services.

Topham K.C. and *Errington* for the petitioner. It is not contended that the performance of the condition as to the wearing a black gown in the pulpit is physically impossible; but in the circumstances it is impracticable.

The dominant intention of the testatrix was to endow a church the services in which should be strictly evangelical. All the conditions have been carried out, except this one condition, and the evidence shows that the performance of this condition would defeat the dominant object of the testatrix. If the condition is not dispensed with, the fund may remain in Court for ever. An impracticable condition attached to the enjoyment of a charitable gift may be varied or dispensed with: Tudor's Charitable Trusts, 4th ed., pp. 202 et seq.; *Glasgow College* v. *Attorney-General* (3); *In re Richardson's Will.* (4) Directions by the Court are usually given in the form of a scheme and a reference to chambers is generally directed; but where the directions required are simple the scheme can be made by the Court without

(1) [1892] 1 Ch. 95.
(2) [1897] 1 Ch. 85, 98.
(3) (1848) 1 H. L. C. 800.
(4) (1887) 58 L. T. 45.

reference to chambers: Tudor, p. 195. The dominant object can be effected by a scheme under which the fund is transferred to the Ecclesiastical Commissioners as part of the endowment of the church.

A. C. Nesbitt for the trustees of the will.

Dighton Pollock for the Attorney-General.

Cur. adv. vult.

May 17. P. O. LAWRENCE J. This is a petition presented by the present incumbent of the church of St. John the Evangelist, Boscombe, Bournemouth, praying for an order directing the transfer to the Ecclesiastical Commissioners of a fund standing to the credit of this action to a separate account entitled "the 1500*l.* Endowment Fund for the proposed Bournemouth church."

The fund represents a legacy bequeathed by the will of the testatrix towards the endowment of a proposed church at Bournemouth. Certain conditions were attached to this bequest, one of which was that a black gown should be worn in the pulpit. The bequest of this legacy has already been considered by the Court on two separate occasions. First, in the year 1891, when North J. decided that the condition imposed by the testatrix as to the wearing of a black gown in the pulpit was not illegal and also that the condition was a continuing condition. And secondly, in the year 1896, when the Court of Appeal affirmed the decision of North J. on both points. The facts are fully stated in the reports of these decisions (1) and (2), and it is unnecessary for me to repeat them here.

The question now raised is whether a scheme can properly be sanctioned by the Court dispensing with the performance of the condition as to the wearing of a black gown in the pulpit. This question was expressly left open by the Court of Appeal. (2)

On the hearing of the present petition counsel for the respondents did not oppose the making of the order asked for,

(1) [1892] 1 Ch. 95. (2) [1897] 1 Ch. 85, 98.

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but on the contrary joined with counsel for the petitioner in urging the Court to make the order.

In these circumstances I considered it advisable to reserve my decision in order to satisfy myself that there were no valid reasons against granting the prayer of the petition. My research has convinced me that counsel have called my attention to all the relevant authorities.

The contention on behalf of the petitioner is that the condition as to the wearing of a black gown in the pulpit is impracticable, but that it is subsidiary to the main purpose of the bequest, and that the present case falls within that class of cases when the main charitable purpose is practicable, but a subsidiary purpose is impracticable. If that contention be correct, I am satisfied that the Court, on assuming the execution of the charitable trusts declared by the testatrix, has ample jurisdiction to execute those trusts cy près and to sanction a scheme, modifying the trusts by dispensing with the subsidiary purpose, so as to carry out, as nearly as possible, the main charitable intentions of the testatrix.

In my judgment, the contention that the condition as to the black gown is subsidiary to the main purpose of the bequest is sound. The dominant charitable intention of the testatrix, as expressed in her will, was to provide a fund towards the endowment of a proposed evangelical church at Bournemouth, the right of patronage and presentation to the living of which should be vested in the trustees of a deed of November 24, 1877. This main purpose can be fully carried into effect apart altogether from the condition as to wearing a black gown in the pulpit. In these circumstances the wearing of the black gown in the pulpit, although expressly insisted upon by the testatrix as a condition of her bequest, is a purpose which is subsidiary to the main purpose of the bequest. Consequently, the Court, if satisfied that the condition is impracticable, can properly sanction a scheme dispensing with it.

There remains to be considered the question whether the condition is impracticable. Several cases have been cited to show that the Court has taken a broad view, when

determining whether a condition may properly be dispensed with on the ground of impracticability. One of the cases so cited is *In re Richardson's Will* (1), where there was a bequest to the Royal National Lifeboat Institution on condition that two tubular lifeboats should be constructed and stationed at Deal and Pwllheli, and the Court, upon evidence that Deal was already sufficiently furnished with lifeboats and that a tubular boat was not so serviceable for Deal as a self-righting boat, dispensed with the condition so far as it related to Deal and substituted another station. This case seems to me to support the proposition that, in a case like the present, it is not necessary to prove that the condition is physically impossible of performance. There are many other reported cases where the Court has dispensed with conditions under analogous circumstances, but no useful purpose would be served by multiplying examples, as each case must necessarily depend upon its own particular facts.

The evidence in support of the petition in the present case shows (1.) that, although in the year 1889 (the date of the will and death of the testatrix) clergymen of the evangelistic school of the Church of England not infrequently preached in a black gown, yet since that date and especially in recent years the use of a black gown in the pulpit has become more and more unusual; (2.) that in none of the churches, the advowsons of which are vested in the trustees of the deed of 1877, is a black gown worn; (3.) that the wearing of a black gown in the pulpit at the present day would be detrimental to the teaching and practice of evangelical doctrines and services in the parish and in the church in question; and (4.) that the use of a black gown in the pulpit would disturb the devotional feelings of the congregation, would be looked upon as an act of eccentricity, would be contrary to the wishes of the persons attending the services and therefore would have an injurious effect upon the evangelical teaching which the testatrix desired to promote and upon the carrying out of the services in the way she desired. This evidence is, in my opinion, corroborated by the fact that no incumbent

(1) 58 L. T. 45.

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has attempted to comply with the condition during the long period which has elapsed since the fund was paid into Court. Judging from the past, it seems to me that, unless the Court dispenses with the condition, the fund is likely to remain in Court for all time, thus rendering the bequest useless and defeating the main intention of the testatrix.

In these circumstances, I think that I am justified in holding that the condition is impracticable and ought to be dispensed with, and so I hold.

The usual course adopted by the Court when executing a charitable trust cy près is to direct a scheme to be settled in chambers, but, as the directions required in the present case are quite simple and as the scheme which the Court is asked to sanction only varies the existing trusts in one point of detail, I think there is no necessity to adopt this course.

I propose therefore to make an order sanctioning the proposed scheme dispensing with the condition as to wearing a black gown in the pulpit, and in accordance with the scheme so sanctioned directing the balance of the fund in Court remaining, after payment thereout of the costs of the petitioner and the respondents, to be transferred to the Ecclesiastical Commissioners as part of the endowment of the church of St. John the Evangelist, Boscombe, Bournemouth.

Solicitors: *Woodcock Ryland & Parker; Bridgman & Co., for W. F. C. Jordan & Co., Teignmouth; Solicitor to the Treasury.*

H. C. H.

In re CROOK'S SETTLEMENT.

In re GLASIER'S SETTLEMENT.

CROOK *v.* PRESTON.

P. O. LAWRENCE J.

1923

April 19, 20.

[1923. C. 398.]

Marriage Settlement—Covenant to settle after-acquired Property—Construction—Wife's Reversion falling into Possession during Coverture—Becoming entitled during Coverture to Property in Possession, Reversion, Remainder, or Expectancy—Effect of s. 19 *of Married Woman's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *on Operation of s.* 2 *of that Act—Husband entitled in Right of Wife.*

By marriage settlement executed by husband and wife in 1896, after a recital that provision should be made for the settlement of the future acquired property of the wife, it was agreed that if the wife during the coverture or the husband in her right should become by any means (except purchase for valuable consideration) seised, possessed, or entitled of or to any real or personal property or any estate or interest whatsoever in possession, reversion, remainder, or expectancy (except certain property which did not include the property in question), such property should be assured by the wife and all other necessary parties to the trustees upon trust that they should (but as to reversionary property not until it fell into possession unless it should appear to the trustees that an earlier title would be beneficial) sell and convert the same and should hold the proceeds upon trusts therein declared in favour of the wife and husband and their children.

At the date of the marriage the wife was entitled in reversion under her parents' marriage settlement to certain policy moneys and the proceeds of sale of certain furniture, subject to the life interests of her parents therein. By the deaths of her parents during her coverture the wife became entitled in possession to the property to which at the date of her marriage she was so entitled in reversion:—

Held, upon the assumption that the property was the property of the wife and therefore capable of being bound by her covenant, that upon the true construction of the settlement, notwithstanding that at the date of her marriage she was entitled to the property in reversion, yet, as she became entitled thereto in possession during the coverture, the property was, within the meaning of the covenant, property to which during the coverture the wife might become entitled in possession, and was therefore caught by the settlement.

Held, further, that, if the property were not bound by the covenant of the wife, then, as the effect of s. 19 of the Married Woman's Property Act, 1882, is to render s. 2 of that Act as if it were non-existent in the case of a settlement which would have bound the property but for

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that Act, the property on falling into possession belonged to the husband in right of his wife and he became bound by his covenant to settle the same.

ADJOURNED SUMMONS.

By an indenture of settlement dated September 20, 1872, made on the marriage of Walter Harris Crook and Mary Ann Crook (then Mary Ann Barker, spinster), W. H. Crook settled certain policies on his life and the moneys to be received thereunder upon trusts for the payment of the income thereof to M. A. Crook during her life and after her death upon the like trusts as thereinafter declared concerning the moneys to arise from the sale of the furniture and effects thereby settled. By the same indenture certain furniture and effects were settled upon trust for M. A. Crook during the joint lives of herself and W. H. Crook and for the survivor of them. Then after the death of the survivor of them the trustees were to sell the same and hold the proceeds and the investments thereof in trust for all or such one or more of the issue of the marriage as W. H. Crook and M. A. Crook should by deed jointly appoint or as the survivor of them should by deed or will appoint and in default of any such appointment in trust for all the children or any the child of the marriage who being male should attain the age of twenty-one or being female should attain that age or marry and if more than one in equal shares.

There were two children only of the marriage—namely, Ethel Mary Crook, who was born in 1873, and another child who died an infant and a spinster.

By an indenture of settlement dated July 17, 1896, and made on the marriage, shortly afterwards solemnized, between Ethel Mary Crook (hereinafter called the wife) with William Glasier (hereinafter called the husband), after a recital that it was agreed that such provision should be made for the settlement of "the future acquired" property of the wife as thereinafter contained, it was by clause 22 thereof agreed and declared that, if the wife at any time during the said intended coverture or the husband in her right should become by devise, bequest, gift, settlement, descent, representation,

transmission or by any other means, except purchase for valuable consideration, seised, possessed, or entitled of or to any real or personal property or any estate or interest whatsoever in possession, reversion, remainder, or expectancy (except property of a less value than 500*l.* vesting in possession during the said intended coverture at the same time and from the same source and except moveable chattels or effects of household domestic or personal use or ornament and except also an annuity or other estate or interest for the life of the wife or for any term or period determinable on her death, all of which it was thereby declared should belong to the wife for her separate use) then and as often as the same should happen, all such real and personal estate, except as aforesaid, should forthwith be assured or transferred by the wife her heirs executors or administrators and all other necessary parties, if any, to the trustees upon trust that the trustees should, with the consent or at the discretion therein mentioned (but as to reversionary property not until it fell into possession, unless it should appear to the trustees that an earlier sale would be beneficial), sell call in and convert into money such part of the said property as should not consist of money and should stand possessed of the moneys to arise from such sale and conversion and of such part of the said property as should consist of money and of the investments of such moneys respectively and of the income of the moneys and investments and of the net income of the real and personal property until sale calling in and conversion upon trusts for the benefit of the wife, her husband and children as therein mentioned. The settlement was executed by both husband and wife.

The mother and the father of Ethel Mary Glasier died after her marriage with Mr. Glasier and during her coverture, that is to say on May 2, 1918, and November 1, 1922, respectively, without having exercised either of the powers of appointment given to them or the survivor of them by the settlement of 1872; and thereupon the trustees of that settlement received a sum of 1059*l.* 9*s.* in respect of the policy on the life of W. H. Crook and the value of the furniture and effects at the

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time of his death was estimated to be the sum of about 2000*l.* This summons was accordingly taken out by the plaintiff John E. W. Crook, who (with the defendant Ethel Mary Glasier) was a trustee of the settlement of 1872, for the determination of the question whether upon the true construction of the settlement of July 17, 1896, and in the events which had happened, the policy moneys and proceeds of sale of the furniture and effects comprised in the settlement of September 20, 1872, were subject to the covenants for the settlement of the after-acquired property of Ethel Mary Glasier contained in clause 22 of her marriage settlement.

C. V. Rawlence for the trustees of the Crook settlement.

Jenkins K.C. and *Vaisey* for the trustee of the Glasier settlement. The property in question is bound by clause 22 of the settlement. The fact that the wife was entitled to the property in reversion at the date of her marriage did not prevent the property from being property to which she became entitled in possession during the coverture within the meaning of clause 22. There was a change in the title by the property falling into possession sufficient to bring it within the covenant: *In re Clinton's Trust* (1); *In re Williams' Settlement.* (2) This case is distinguishable from *In re Bland's Settlement* (3), where the words were simply "become entitled," which were held to mean "become entitled in interest" and not in possession.

Further, if the reversion when it fell into possession was not caught by the wife's covenant, it became bound by the husband's covenant. The settlement must be construed in accordance with the law which would have been in force if the Married Woman's Property Act, 1882, had not been passed: s. 19 of that Act provided that nothing in the Act (including s. 2) was to affect any settlement made or to be made of the property of a married woman: *In re Whitaker* (4); *Hancock* v. *Hancock* (5); *Stevens* v. *Trevor-Garrick.* (6) The

(1) (1872) L. R. 13 Eq. 295.
(2) [1911] 1 Ch. 441.
(3) [1905] 1 Ch. 4.
(4) (1887) 34 Ch. D. 227.
(5) (1888) 38 Ch. D. 78.
(6) [1893] 2 Ch. 307.

result is that the property, on falling into possession during the coverture, became the property of the husband in right of his wife and became bound by his covenant to settle the same.

Gavin Simonds, for William Glasier, adopted the last argument and referred to Norton on Deeds, 2nd ed., p. 597.

Ashworth James, for the child of the marriage, also adopted the last argument.

Ward Coldridge K.C. and *Harman* for Mrs. Glasier. The wife did not become entitled to the property in possession during the coverture within the meaning of the covenant, because she was already entitled to it in reversion. The mere change in her title from reversion to possession is not enough to bring the property within clause 22. The language of the clause shows that the covenant applies only to property acquired in title in futuro. The case is covered by the decisions in *In re Bland's Settlement* (1) and *In re Capel's Trusts*. (2) The words in the first case were "become entitled" and in the latter case were "become entitled in any manner and for any estate or interest." Those cases show that property to be caught by the words used in those cases must be property which is vested in interest during the coverture: see also *In re Yardley's Settlement* (3), and *In re Ware*. (4) The words here are " in possession, reversion, remainder, or expectancy " and add nothing to the shorter expression used in *In re Capel's Trusts* (2) and should bear the same construction as was placed upon them in that case. The decision in *In re Williams' Settlement* (5) is the very limit to the instances in which the property has been held to be brought within the settlement. If this reversion is within the settlement, it follows that the reversion was not capable of being disposed of by the wife during the coverture, because it was always bound by the covenant.

The Married Woman's Property Act, 1882, neither diminishes nor extends the construction of the clause in question. The

(1) [1905] 1 Ch. 4.
(2) [1914] W. N. 378.
(3) (1908) 124 L. T. J. 315.
(4) (1890) 45 Ch. D. 269.
(5) [1911] 1 Ch. 441.

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settlement referred to in s. 19 of that Act must mean a settlement which is binding on the wife.

Cecil Turner, for the executors of Walter Harris Crook, who was interested in another question not material to this report.

P. O. LAWRENCE J. The question which I have to decide is, in my judgment, purely one as to the effect which, in the circumstances, ought to be given to clause 22 of the marriage settlement of July 17, 1896. In my opinion it is clear that a covenant for the settlement of after-acquired property can be so framed as to include property to which the wife may become entitled in possession during the coverture, although at the date of the marriage she is entitled to a reversionary interest in the property and such reversionary interest is not comprised in the settlement—indeed, counsel did not contend to the contrary. Whether the property now in question is caught by the covenant to settle after-acquired property contained in the settlement of July 17, 1896, depends therefore, in the first instance, upon the true construction of that covenant.

Construing this covenant to the best of my ability, I hold it to include every estate or interest in any real or personal estate, whether such estate or interest happens to be an estate or interest in possession or an estate or interest in reversion or an estate or interest in remainder or an estate on interest in expectancy of or to which the wife or the husband in her right may become seised or possessed or entitled during the coverture. In the present case the wife during the coverture became entitled for the first time to an interest in possession in the personal property settled by her parents' marriage settlement, and that interest, in my opinion, falls within the express words of the covenant. The fact that the wife was entitled to a reversionary interest in that property at the date of her marriage, which reversionary interest was not expressly dealt with by the settlement, does not, in my opinion, operate to exclude the interest of the wife, when it became an interest in possession, from the covenant, regard being had to the express words contained in the

covenant. I find nothing in the settlement to exempt from the operation of the covenant property to which the wife becomes entitled in possession during the coverture, merely because at the date of the settlement she had a reversionary interest in the property. So long as the interest of the wife remained in reversion it was outside the settlement altogether and could no doubt have been disposed of by her, but as she did not dispose of it and as it happened to fall into possession during the coverture it is, in my opinion, bound by the covenant. I do not agree with the argument that, if the property in question is caught by the covenant, it follows that the reversionary interest was incapable of being disposed of during the coverture. In my opinion any assignment of the wife's interest whilst it remained reversionary would have conferred a good title on the assignee. After such an assignment the wife would not have become entitled to an interest in possession in the property, because such interest would vest not in her but in her assignee. In none of the cases which have been cited by counsel is the wording of the covenant the same as in the present case. Moreover, those cases are not very helpful in furnishing a general guide to the construction of covenants of this kind, as they appear to me to be somewhat conflicting and not easy to reconcile. The cases of *In re Clinton's Trust* (1); *Archer* v. *Kelly* (2); and *In re Williams' Settlement* (3), seem to me to favour the opinion which I have formed. On the other hand, the cases of *In re Bland's Settlement* (4), and *In re Capel's Trusts* (5) seem to me to tend rather the other way. In these circumstances I consider that I am bound to express my own view on the construction of the covenant and I have accordingly done so.

Assuming, however, that I have taken an erroneous view of the construction of the covenant there is another way of arriving at the same result. Apart from the wife's covenant I am of opinion that the interest in question became bound

(1) L. R. 13 Eq. 295.
(2) (1860) 1 Dr. & Sm. 300.
(3) [1911] 1 Ch. 441.
(4) [1905] 1 Ch. 4.
(5) [1914] W. N. 378.

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by the husband's covenant by virtue of s. 19 of the Married Woman's Property Act, 1882. Had it not been for s. 2 of that Act, the interest of the wife on falling into possession during coverture would have gone to the husband. Now s. 19 enacts (inter alia) that nothing contained in the Act is to interfere with or affect any settlement to be made before marriage respecting the property of a married woman. In the case of *Stevens* v. *Trevor-Garrick* (1) Chitty J. held that a settlement made after the passing of the Act by a husband of property belonging to his wife bound that property, although the wife (being an infant and having afterwards disaffirmed) had not made a binding assignment of that property, and although, apart from s. 19 of the Married Woman's Property Act, 1882, that property would have been the separate property of the wife. The decision in that case, which was followed by Buckley J. in *Buckland* v. *Buckland* (2), in my opinion governs the present case. Here the husband has covenanted that any property to which he should during the coverture become entitled in right of his wife should be settled, and, but for s. 2 of the Act, the interest in question, when it fell into possession, would have belonged to the husband in right of his wife and would have been caught by his covenant. Applying the principle enunciated by the above-mentioned cases, the husband's agreement to settle his wife's after-acquired property operates by virtue of s. 19, so as to bring the interest within the scope of the covenant.

Accordingly, there will be a declaration that the property comprised in the settlement of September 20, 1872, is subject to the covenant for the settlement of the wife's after-acquired property contained in the settlement of July 17, 1896.

Solicitors: *Tomlin & Dinwiddy, for Ayrton & Alderson Smith, Liverpool; Preston & Foster; Fladgate & Co.*

(1) [1893] 2 Ch. 307. (2) [1900] 2 Ch. 534.

H. C. H.

CIVIL SERVICE CO-OPERATIVE SOCIETY, LIMITED *v.* TRUSTEE OF SIR J. R. D. McGRIGOR, Bart.

RUSSELL J.

1923

April 10, 13, 26.

[1922. C. 5215.]

Lease—Covenant not to assign—Proviso for Re-entry on Bankruptcy of Lessees—Bankruptcy of Lessees—Forfeiture—Fourteen days' notice to enforce Right of Re-entry sufficient—Notice not invalidated by Omission to require Lessees to make Compensation for Breach of Covenant—Issue of Writ—Demand for and Acceptance of Rent accrued due partly after Bankruptcy and partly after Issue of Writ not a Waiver of the Forfeiture—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 2, 6—*Conveyancing Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 2, *sub-s.* 2.

A lease contained a covenant by the lessees not to assign, underlet, demise or otherwise part with the premises without the licence in writing of the lessors, and there was a proviso giving the lessors the right of re-entry in the event of the lessees becoming bankrupt or having a receiving order made against them.

On October 18, 1922, the lessees presented their petition in bankruptcy, and on the same day a receiving order was made thereon. On October 24, 1922, on the application of the official receiver, and with the consent of the debtors, they were adjudicated bankrupts. On November 6, 1922, a trustee in bankruptcy was appointed, and subsequently he entered into possession of the demised premises without any opposition on the part of the bankrupts, and without having to obtain any order ordering them to give up possession to him :—

Held, that the lessors were entitled to enforce their right of re-entry or forfeiture on the bankruptcy of the lessees, but subject to the provisions of s. 14, sub-ss. 1, 2, of the Conveyancing Act, 1881.

On November 13, 1922, the lessors served on the debtors and the trustee in bankruptcy a notice of their intention on the expiration of fourteen days to enforce the right of re-entry or forfeiture under the proviso. This notice did not require the lessees to make compensation for the breach of covenant.

Held, that fourteen days was sufficient notice, and that the notice was valid, although it did not require the lessees to make compensation.

On December 28, 1922, the lessors made a demand for and accepted rent due on December 25.

Held, that the demand for and acceptance of rent accrued due partly after the bankruptcy and partly after the issue of the writ did not operate as a waiver of the forfeiture.

By a lease dated November 6, 1914, the plaintiffs demised certain premises in Panton Street to Sir James McGrigor and Edward Biss (who carried on business as bankers and army agents under the style or firm of Sir Charles R. McGrigor, Baronet & Co.) for a term of thirty-five years

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at the yearly rent of 700*l.*, payable quarterly on the usual quarter days. The lessees were bound also to pay by way of further or additional rent the sum of 36*l.* 15*s.* in each year towards the cost of supply of hot water to the lavatories, and heat to the radiators. The lessees' covenants included the following. No. 2: "To bear, pay, and discharge all existing and future rates, taxes, assessments, duties, impositions, and outgoings whatsoever which now are or hereafter shall be assessed, imposed, or charged upon the demised premises or upon the rents hereby reserved, or upon the landlord, lessee, or occupier in respect thereof, except landlord's property tax." No. 11: "Not at any time during the term hereby granted to assign, underlet, demise, or otherwise part with this indenture of the premises hereby demised or any part thereof, or any estate or interest therein for all or any part of the said term to any person or persons whomsoever without the license in writing of the lessors first had and obtained, such license not to be unreasonably withheld in the case of a respectable and responsible assignee or tenant." The proviso for re-entry was in the following terms: "Provided always and these presents are upon this condition that if the said yearly rents hereby reserved, or any part thereof, shall at any time be in arrear and unpaid for 21 days after the same shall have become due (whether any formal or legal demand thereof shall have been made or not), or if the lessees shall at any time fail or neglect to perform or observe any of the covenants or agreements herein contained and on their part to be performed and observed, or if the lessees shall at any time during the said term and whilst the same shall be vested in them or their said assigns as the case may be, become bankrupt or have a receiving order in bankruptcy made against them, then and in any such case it shall be lawful for the lessors or any person or persons duly authorised by them in that behalf into and upon the said demised premises or any part thereof in the name of the whole to re-enter, and the said premises peaceably to hold and enjoy thenceforth as if these presents had not been made, without prejudice to any right of action or remedy by the

lessors in respect of any antecedent breach of any of the covenants by the lessees hereinbefore contained." The lessees entered into possession, and carried on their business on the premises.

On October 18, 1922, the lessees presented their petition in bankruptcy, and on the same day a receiving order was made thereon. On October 24, 1922, on the application of the official receiver, and with the consent of the debtors, they were adjudicated bankrupts. On November 6, 1922, a trustee in bankruptcy was duly appointed. The trustee entered into possession of the demised premises without any opposition on the part of the bankrupts, and without having to obtain any order ordering them to give up possession to him.

On November 13, 1922, the plaintiffs served a notice in the following terms. It was addressed: "To Sir James Roderick Duff McGrigor, Bart., and Edward Albert Biss," and "To their trustee in bankruptcy and to all other the person or persons (if any) interested in the premises hereinafter more particularly described. We the undersigned as solicitors for and on behalf of the Civil Service Co-operative Society, Limited (hereinafter called 'the Company'), give you notice as follows." Then para. 1 set out the terms of the lease. Para. 2 set out, in particular, the proviso as to re-entry. Para. 3 set out the receiving order, and the adjudication in bankruptcy, and para. 4 was in these words: "Now take notice that upon the expiration of 14 days from the date of this notice the Company intends to enforce the right of re-entry or forfeiture under the proviso or stipulation in that behalf hereinbefore mentioned by action or otherwise as the Company may be advised."

On November 28, 1922, the writ in the present action was issued. On December 28, 1922, the defendant received from the plaintiffs a written demand for 203*l.* 15*s.*, addressed to "The Liquidators, Sir Charles McGrigor & Co." This sum was made up of three items as follows: to rent, December 25, 1922, 175*l.*; to rent radiators, 9*l.* 3*s.* 9*d.*; to water rate, 19*l.* 11*s.* 3*d.* A cheque for 203*l.* 15*s.*, dated December 28,

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1922, payable to the Haymarket Stores, the plaintiffs' trade name, and signed by the trustee in bankruptcy and a member of the committee of inspection (each described as such), was sent to, and cashed by, the plaintiffs. On December 29, 1922, a receipt was sent by the plaintiffs: "Received of the liquidators Sir Charles McGrigor, Bart. & Co., the sum of 203*l.* 15*s.* for rent account Christmas."

In the action the plaintiffs claimed a declaration that they were entitled to recover possession of the premises as on a forfeiture of the lease, delivery up of possession of the premises, and mesne profits.

H. S. Preston K.C. and *Turnbull* for the plaintiffs. The plaintiffs say they are entitled to re-enter because (*a*) the bankrupts parted with possession of the premises without licence, and (*b*) because of the act of bankruptcy. The defendant says that the notice of November 13, 1922, is bad under the Conveyancing Act, 1881, and, therefore, the plaintiffs cannot bring this action on the ground of bankruptcy. He also says that since the alleged causes of forfeiture the plaintiffs accepted a quarter's rent, due on December 25, 1922, and that that was a waiver of their rights. Under s. 14, sub-s. 1, a lessor must serve a lessee with a notice, specifying the particular breach, but by sub-s. 6 the section does not apply in the case of a forfeiture on the bankruptcy of the lessee, or on assigning without licence. Then s. 2, sub-s. 2, of the Conveyancing Act, 1892, provides, as to a condition for forfeiture on bankruptcy, that s. 14, sub-s. 6, of the Act of 1881 is to apply only after the expiration of one year from the date of the bankruptcy, provided the lessee's interest is not sold within the year, in which case sub-s. 6 shall cease to be applicable. But s. 14, sub-s. 6, is still in force as to assigning without licence. The whole subject is dealt with in *Horsey Estate, Ld.* v. *Steiger*. (1) There was a doubt expressed in that case as to whether two days' notice was sufficient; therefore the fourteen days' notice given by the plaintiffs must be ample. The acts of

(1) [1899] 2 Q. B. 79.

the bankrupts were all voluntary. They presented their petition, consented to being adjudicated bankrupts, and parted with possession of the premises to the trustee in bankruptcy without any order being made. They therefore committed a breach of the covenant not to part with possession of the premises. The forfeiture was completed by the issue of the writ, and once there is a forfeiture it cannot be waived, and the demand for and receiving of the rent makes no difference.

E. W. Hansell and *Bovill* for the defendant. There was no breach of the covenant not to assign. The fact that the lessees were adjudicated bankrupts on their own petition makes no difference: *In re Riggs.* (1) The covenant not to assign applies to an act of the debtor in assigning his property, and not to where it automatically vests in the trustee in bankruptcy.

There remains the act of bankruptcy as a ground of forfeiture. The defendant says the action is bad because no proper notice under the Conveyancing Act has been given, because, in the circumstances and having regard to the objects of giving the notice as laid down in *Horsey's Case* (2), the notice was unreasonable, and it was also bad because the notice did not require compensation for the breach of covenant (see Foà on The Law of Landlord and Tenant, 5th ed., p. 641). *Lock* v. *Pearce* (3) has excepted from the rule that a notice must require compensation the case of a breach which can be remedied. The breach in that case was one capable of remedy. Fourteen days was an unreasonable notice, because the trustee was not confirmed by the Board of Trade in his trusteeship until November 7. A trustee has many pressing and onerous duties, and he cannot deal with a question like this in fourteen days. He requires time to find out if the lease has any value at all.

Sect. 2, sub-s. 2, of the Act of 1892 means that the trustee is to have a year to effect a sale of the property. The sub-section lets in s. 14 of the Act of 1881 for a year, and

(1) [1901] 2 K. B. 16. (2) [1899] 2 Q. B. 79, 91.
(3) [1893] 2 Ch. 271.

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then it says that in the event of the lessee's interest being sold within the year, sub-s. 6 would cease to be applicable thereto. That contemplates, in case of breach of covenant, that the trustee may have a year to sell in, and if the property is sold within the year, s. 14, sub-s. 6, ceases to be applicable and lets in the whole of s. 14. Unless we predicate that the trustee is entitled to sell within a year, it is impossible to make sense of the section.

Then comes the question of waiver. The demand for rent was an assertion that the liquidator was liable to pay rent, and the form of the receipt was an assertion by the plaintiffs that the liquidator was their tenant. Where a landlord has elected by the issue of a writ to forfeit, the after receiver of rent is not a waiver of the forfeit which the landlord can avail himself of against the tenant, but the tenant can say, "I am not bound by your election as shown by the issue of the writ, as since then you have manifested another election by taking the rent, and I can choose which election is most advantageous to me": *Dendy* v. *Nicholl.* (1) In *Keith, Prowse & Co.* v. *National Telephone Co.* (2) the acceptance of rent was treated as waiver of a notice to determine an agreement. The general principle is that demand for and acceptance of rent after action for forfeiture is commenced is a waiver of forfeiture. There was an absolute waiver here. A lessee cannot apply for relief against re-entry or forfeiture after the lessor has actually re-entered: *Rogers* v. *Rice.* (3) The tenant can claim relief until the landlord has obtained possession: *Quilter* v. *Mapleson.* (4) Here there can be no re-entry until there is a decision in this action. They also cited *Evans* v. *Wyatt.* (5)

Preston K.C. in reply. The service of the writ operated as a final election by the lessor to determine the lease, and he could not sue afterwards for rent due or covenants broken: *Jones* v. *Carter.* (6) This would be so, even if the lease had provided that no waiver by the lessor should take effect

(1) (1858) 4 C. B. (N. S.) 376.
(2) [1894] 2 Ch. 147.
(3) [1892] 2 Ch. 170.
(4) (1882) 9 Q. B. D. 672.
(5) (1880) 43 L. T. 176.
(6) (1846) 15 M. & W. 718.

unless it were in writing: *Rex* v. *Paulson*. (1) Nor does a distraint for rent preclude the lessor from relying at the trial on a breach of covenant: *Grimwood* v. *Moss*. (2) *Evans* v. *Enever* (3) was a case of bankruptcy, and it was held there that the acceptance of rent accrued due after the adjudication did not operate as a waiver of the forfeiture, and in *Doe* v. *Batten* (4) it was held that acceptance of rent did not operate as a waiver. *Evans* v. *Wyatt* (5) was simply a decision on demurrer that a subsequent demand and acceptance of rent might be evidence of a new agreement.

According to the arguments for the defendant in regard to s. 14, sub-s. 6, of the Conveyancing Act, 1881, and s. 2, sub-s. 2, of the Conveyancing Act, 1892, all the lessors' rights are hung up for a year, although in the meantime the assets might be distributed and dividends paid. If that were a sound view it would be a complete answer to *Horsey Estate, Ld.* v. *Steiger* (6) and *Ewart* v. *Fryer*. (7)

The lessees by their own act forfeited the term, and actually forfeited possession of the property: see s. 48 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59). This case comes within *In re Amherst's Trusts* (8) and *In re Cotgrave*. (9) There has been a clear forfeiture here.

Cur. adv. vult.

April 26. RUSSELL J. The plaintiffs claim that they are entitled to recover possession as on a forfeiture of the lease, and they ask for delivery up of possession, and mesne profits. They base their claim to re-enter on two grounds—namely: (1.) breach of the covenant (No. 11) against assignment or otherwise parting with the demised premises, or any estate or interest therein; and (2.) the bankruptcy of the lessees. The defendant, who is the trustee in bankruptcy, raises various defences. As to the first ground, he says there has been no breach of the covenant; as to the second ground, he

(1) [1921] 1 A. C. 271.
(2) (1872) L. R. 7 C. P. 360.
(3) [1920] 2 K. B. 315.
(4) (1775) 1 Cowp. 243.
(5) 43 L. T. 176.
(6) [1899] 2 Q. B. 79.
(7) [1901] 1 Ch. 499.
(8) (1872) L. R. 13 Eq. 464.
(9) [1903] 2 Ch. 705.

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relies on the provisions of the Conveyancing Act, 1892, the effect of which, he says, is to deprive a landlord of all right of re-entry on the ground of the tenant's bankruptcy for the space of one year from the date of bankruptcy, and to deprive him of such right altogether if within that year the lessee's interest be sold. He also says that even if the landlord is entitled to re-enter during the year he can only do so after service of a valid notice under s. 14, sub-s. 1, of the Conveyancing Act, 1881, and that the notice of November 13, 1922, was an invalid notice. Finally (and this applies to both the grounds of the plaintiffs' claim) the defendant relies upon a demand for, and payment and acceptance of, rent as a waiver since action brought of the causes of forfeiture. Assuming that the plaintiffs are entitled to recover possession of the premises, the defendant makes no claim to relief from the forfeiture. It will be convenient to deal first with the plaintiffs' claim, so far as it is founded on the bankruptcy of the tenants. But for the Conveyancing Act, 1892, there could (subject to the waiver point) be no defence to this claim. This is clear from a consideration of s. 14 of the Conveyancing Act, 1881. That section (by sub-s. 1) imposes a fetter upon a landlord's exercise of the right conferred upon him by a lease to re-enter for breach of any covenant or condition in the lease; by sub-s. 2 it empowers the Court to grant relief to the tenant. These two sub-sections are general in their terms, and would apply to all covenants and conditions, upon the breach of which, or in pursuance of which, the landlord was, by the terms of the lease, entitled to re-enter. By sub-s. 6 there is taken out of the section (among other cases) the case of a landlord's right to re-enter in pursuance of a condition for forfeiture on the bankruptcy of the lessee. In other words, sub-ss. 1 and 2 impose a fetter on the right of re-entry in general terms; sub-s. 6 removes the fetter from a right of re-entry arising from the bankruptcy of the tenant. If the Act of 1881 stood alone the position in this case would be clear. The Conveyancing Act, 1892, introduces a complication. The provision relevant to this action is s. 2, sub-s. 2, which runs thus: "Sub-section 6 of section 14

of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section 6 shall cease to be applicable thereto." Mr. Hansell contended that the effect of s. 2, sub-s. 2, of the Act of 1892 was to deprive the landlord altogether of his right of re-entry or forfeiture on bankruptcy of the lessee for the space of a year from the date of the bankruptcy. For that period his right, he says, is completely taken away: it is not merely fettered, it is abrogated. I can find no foundation for this in the words of the Legislature; and it would be strange if words which purport merely to suspend an exemption from the provisions of a previous statute should operate to impose a total disability which that statute did not pretend to impose.

In my opinion the operation of s. 2, sub-s. 2, of the Act of 1892 is this: The right of entry or forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest is fettered; if the lessee's interest be not sold within the one year the fetter is removed at the end of the year; if the lessee's interest be sold within the one year the fetter is not removed, but continues. In the present case the lessee's interest has not been sold; a conditional contract for sale has been entered into conditional upon the defendant succeeding in the present action. If the contention that the landlord is during the year deprived altogether of his right of re-entry or forfeiture on bankruptcy of the lessee is well founded, the cases of *Horsey Estate, Ld.* v. *Steiger* (1) and *Ewart* v. *Fryer* (2) might have been shortly disposed of on that ground. In my opinion the contention is not well founded; and I hold that the landlord is entitled to enforce his right of re-entry or forfeiture on bankruptcy of the lessee, but subject to the provisions of s. 14, sub-ss. 1 and 2, of the Act of 1881. The result is that the plaintiffs here were

(1) [1899] 2 Q. B. 79. (2) [1901] 1 Ch. 499.

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bound to serve a valid notice under s. 14, sub-s. 1, of the Act of 1881. It is said that the notice of November 13, 1922, is invalid on two grounds; first because the fourteen days therein named was an unreasonably short time in the circumstances of the case, and secondly, because the lessee was not thereby required to make compensation for the breach. As to the first ground, no evidence was given of any special circumstances rendering this case one which required exceptional treatment. As was stated by the Court in *Horsey Estate, Ld.* v. *Steiger* (1) the notice is intended to give the person whose interest it is sought to forfeit an opportunity of considering his position, and acting before an action is brought against him. It appears to me that fourteen days was a sufficient time for this purpose. The second ground raises a curious question. It is difficult to see what compensation for the breach could be asked for in the case of bankruptcy. The breach is irremediable. The only compensation suggested in argument before me was the payment of a sum of money in respect of increase in value of the property since the date of the lease. This would not be compensation for the breach, but a payment to compensate for the non-exercise of the right of re-entry. It would rather be a term for relief from forfeiture under sub-s. 2. In truth the provisions of sub-s. 1 do not fit the right of re-entry or forfeiture on bankruptcy of the lessee; they were not intended to deal with that case, which is specifically excluded from them by sub-s. 6. Eleven years later that case is brought within them by the Act of 1892; and I must deal with the section accordingly. I confess that, unassisted by authority, the wording of the section causes me trouble. The words "in any case" appear to me to mean "whether the breach is capable of remedy or not"; and the section would seem to call for a notice which requires the lessee to make compensation for the breach both where the breach is capable of remedy, and where it is incapable of remedy. However, the Court of Appeal has held, in general terms, that if the landlord does not desire compensation he need not require it, and that the absence

(1) [1899] 2 Q. B. 79.

of a requirement for compensation does not invalidate a notice under sub-s. 1: see *Lock* v. *Pearce*. (1) I am content to follow the views there expressed. As Lindley L.J. said (2): "Supposing the lessor does not want compensation, is the notice to be held bad because he does not ask for it? There is no sense in that." A similar question may be asked, and a similar answer given, in a case where not only does the lessor not desire compensation, but where no compensation for the breach is possible. I decide that the notice here given was a valid notice.

There remains for consideration the point as to waiver. The facts are these. [His Lordship stated the facts relating to the demand for and acceptance of the rent and continued:] This amounts to a demand by the plaintiffs (with knowledge of the bankruptcy) for rent (accrued in part before the bankruptcy, in part between the bankruptcy and the writ, and in part subsequent to the writ), followed by payment and acceptance. Does this operate as a waiver of the forfeiture? Upon a consideration of the authorities I am of opinion that it does not. The defendants relied upon the cases of *Dendy* v. *Nicholl* (3) and *Keith, Prowse & Co.* v. *National Telephone Co.* (4) In *Dendy* v. *Nicholl* (3) the landlord, with knowledge of an underletting in breach of covenant, sued the tenant for arrears of rent accruing subsequently to the underletting, and obtained payment thereof. After the issue of the writ for rent, but before actual payment of the amount claimed, the landlord commenced an ejectment action based on non-payment of rent and the underletting. It was held that the bringing the action for rent, and acceptance of the rent in that action, was a waiver of the right of re-entry. The waiver occurred before ejectment brought. *Keith, Prowse & Co.* v. *National Telephone Co.* (4) was not strictly a case of landlord and tenant. It was a case of a telephone company having given notice determining a telephone agreement on December 30, and subsequently claiming and receiving payment of "rent" up to December 31. It was held that by so doing they had

(1) [1893] 2 Ch. 271.
(2) [1893] 2 Ch. 279.
(3) 4 C. B. (N. S.) 376.
(4) [1894] 2 Ch. 147.

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waived their notice determining the contract. Neither of those cases touches the real question—namely, whether the issue and service of a writ in ejectment is such a final election by the landlord to determine the tenancy that a subsequent receipt of rent is no waiver of the forfeiture. In my opinion the authorities establish that this is so. In *Jones* v. *Carter* (1) Parke B. held that after ejectment brought, there being no evidence of actual re-entry by the landlord, the landlord could not sue for rent; and he cites with approval a decision of Lord Tenterden that the receipt of rent after ejectment brought for a forfeiture was no waiver of such forfeiture: *Doe* v. *Meux*. (2) To the same effect is the case of *Grimwood* v. *Moss* (3), where it is definitely stated that the bringing of an ejectment action is an irrevocable election to determine the tenancy: see also *Rex* v. *Paulson* (4); and *Evans* v. *Enever*. (5) I adopt the words of Lord Coleridge J. in *Evans* v. *Enever* (5), when he says (6): "There is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position."

The plaintiffs are, accordingly, entitled to recover possession on the ground of the bankruptcy of the tenants. This renders it unnecessary to decide whether the plaintiffs are entitled to recover possession on the ground of breach of the lessees' covenant No. 11: and I need say nothing about it.

The plaintiffs are entitled to the relief claimed by them. The mesne profits will be at the rate of the sums payable under the lease, credit being given for the 203*l*. 15*s*. If the parties can agree the amount the sum can be inserted in the judgment.

Solicitors for the plaintiffs: *Nicholson, Freeland & Shepherd.*
Solicitors for the defendant: *Piesse & Sons.*

(1) 15 M. & W. 718.
(2) (1824) 1 C. & P. 346.
(3) L. R. 7 C. P. 360.
(4) [1921] 1 A. C. 271.
(5) [1920] 2 K. B. 315.
(6) [1920] 2 K. B. 320.

P. J. B.

EVE J.
1923
May 10.

In re SLACK'S SETTLEMENT.

In re SLACK.

BUTT *v.* SLACK.

[1922. S. 8344.]

Will—Settlement—Special Power of Appointment—Power to Donee to appoint by Will in favour of her Children—Devise and Bequest of all her residuary Estate, and all other "if any" the Estate over which she might have a Power of Appointment to Trustees in trust for her Two Daughters—Not a valid Exercise of the Power.

Under her marriage settlement, a testatrix had a special power of appointment over a settled fund in favour of the issue of her then intended marriage. By her will she gave all her residuary estate "and all other if any the estate and effects over which I may have a power of appointment" to the trustees of her will upon trust for sale and conversion, and out of the proceeds thereof to pay her just debts, funeral and testamentary expenses, and she directed her trustees to stand possessed of her residuary estate upon trust to divide the same between her two daughters in equal shares:—

Held, that the introduction of the words "if any" into the clause purporting to exercise a power of appointment negatived any intention to exercise the special power, and that, therefore, the will did not operate as an exercise of the power.

UNDER her marriage settlement, dated June 19, 1868, the testatrix had a special power of appointment over a settled fund in favour of all or any such one or more of the issue of her then intended marriage in such manner and form in every respect as she should by deed or will or codicil appoint.

By her will, dated October 8, 1913, the testatrix appointed the plaintiffs, Douglas Bennett and Arthur Walker, trustees thereof, and she gave, devised and bequeathed all the rest, residue and remainder of her real and personal estate and effects, "and all other if any the estate and effects over which I may have a power of appointment at the date of my death unto my trustees," upon trust for sale and conversion, with power to postpone, and out of the proceeds thereof to pay her just debts, funeral and testamentary expenses, and she directed her trustees to stand possessed of her residuary estate upon

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trust to divide the same between her daughters, the plaintiffs, Ethel Butt (then Ethel Neering) and Gladys Slack in equal shares, provided always that if either of her daughters died in her lifetime leaving issue, such issue should take their, his, or her mother's share, and if either of them should die in her lifetime without leaving issue then the share of the one so dying should devolve upon the survivor. She also gave to her trustees a power of maintenance and accumulation for the benefit of a grandchild or grandchildren or more remote issue, and she empowered them to apply moneys for the advancement of a grandchild or grandchildren or more remote issue. The testatrix also declared that her trustees might employ a solicitor or other agent to transact all or any business required to be done in connection with "my estate," and she further declared that any trustee being a solicitor or accountant should be entitled to charge all his usual professional or other charges for any business done by him or his firm in connection with the trusts "of this my will."

The testatrix died in 1922, possessed of property which she had power to dispose of in addition to the property which she could appoint. Under these circumstances this summons was taken out, and it asked for the determination of the question whether the limited power of appointment given to the testatrix by the settlement was duly exercised by her in favour of her two daughters.

J. Bennett for the plaintiffs. The clause purporting to exercise the power is sufficient, if there are no inconsistencies in the will. There is nothing in this will really inconsistent with the exercise of the power. The power given to the trustees to sell is only slightly outside the power of the testatrix, and is not sufficient to invalidate the exercise of the power. As is stated in Theobald on Wills, 7th ed., p. 248, an intention expressed in the will to exercise the power is a sufficient exercise of a special power. The direction to pay funeral and testamentary expenses does not invalidate the exercise of the power: *In re Swinburne.* (1) If the power

(1) (1884) 27 Ch. D. 696.

has been properly exercised, the fact that the testatrix has exceeded her power does not invalidate her exercise of it: *Von Brockdorff* v. *Malcolm* (1); *In re Ackerley.* (2) A gift of residue would be an exercise of a general power. In *In re Cotton* (3), where it was held that the power had not been properly executed, North J. relied on the fact that many of the limitations were impossible if the testatrix were exercising the power. The power here is very much wider than in *In re Weston's Settlement* (4), where it was held that it had not been properly exercised. The only indications here against the exercise of the power are the directions to pay debts and funeral and testamentary expenses, and the power given to trustees to charge for their professional services, but these are not sufficient to take away the words exercising the power, which are very clear.

Gover K.C. and *C. E. R. Abbott* for beneficiaries in default of appointment. The fundamental rule is to find from the will what was the intention of the testatrix. This principle is clearly expressed by Stirling J. in *In re Milner.* (5) The words used in what purports to be an exercise of a power manifest an extreme doubt in the mind of the testatrix as to whether she had any power of appointment. The mere fact of giving the trust property to the trustees of the will would not prevent the exercise of the power, but there is the trust for sale and conversion, and that is inconsistent with the exercise of the power, as was pointed out by Buckley J. in *In re Weston's Settlement.* (6) The delegation of power to the trustees in respect to the maintenance of infants cannot be maintained: *In re Greenslade* (7); and it is also inconsistent with the exercise of the power. Again the giving to the trustees a power of advancement is a strong indication against the exercise of the power. So also is the power given to a solicitor trustee to charge for professional services. It is also to be noted that in giving the power to employ

(1) (1885) 30 Ch. D. 172.
(2) [1913] 1 Ch. 510.
(3) (1888) 40 Ch. D. 41.
(4) [1906] 2 Ch. 620.
(5) [1899] 1 Ch. 563, 565.
(6) [1906] 2 Ch. 620, 625, 626.
(7) [1915] 1 Ch. 155.

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a solicitor the testatrix uses the words "my estate." There is no decided case which shows such an accumulation of contrary intentions.

Bennett in reply.

EVE J. I might well commence my judgment with the initial observation of Pearson J., in *Von Brockdorff* v. *Malcolm* (1) that this is a case which no judge could decide without misgiving. With all respect I find a difficulty in some of the cases cited, in satisfactorily identifying in the instrument the words relied upon as exercising the power or establishing an intention to exercise it, but I must bear them in mind and take care that in construing this will I avoid any conclusion which may seem to be inconsistent with them. The document by which the power was given is a marriage settlement dated in 1868, and thereunder, in the events which happened, the testatrix had a power of disposing of the trust funds among all or any such one or more of the issue of her marriage in such manner and form as she should by deed or will or codicil appoint. She made her will in 1913, forty-five years after the date of the settlement and twelve years after the death of her husband, and the question is, Did she thereby exercise that special power? In order to answer that question I have to see whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention to be gathered from an examination of the whole will, wherein, as has been pointed out, are to be found indications some supporting and others negativing such intention. Mr. Bennett, who argues that the power was exercised, relies strongly on the language employed by the testatrix in disposing of her residuary estate. After giving, devising and bequeathing all the rest, residue and remainder of her real and personal estate and effects she goes on "and all other if any the estate and effects over which I may have a power of appointment at the date of my death."

It is obvious that the testatrix did not intend to die intestate,

(1) 30 Ch. D. 172, 179.

but it does not seem to me that it necessarily follows that an intention to exercise any particular power underlies this language. The clause is framed in wide terms to cover all the property over which she had any power of disposition. There is, however, one thing throughout the will that is consistent with the intention to exercise the power, and that is that there is no attempt to benefit any one who is not an object of the power. That is one element in support of the contention that she intended to exercise the power. On the other hand, the appointment is to trustees, and in their hands the property appointed is subject to obligations and limitations not so consistent with the intention to exercise the power. They are to stand possessed of her estate and effects upon trust for sale with a power to postpone, indications slight it may be but still not quite consistent with the view that the testatrix was intending to deal with a fund already in the hands of other trustees. Then comes an imposition which, apart from authority, I should have been inclined to regard as almost conclusive that the donee did not intend to exercise the power—namely, the imposition of the liability to pay debts, funeral and testamentary expenses. But according to the authorities I ought not to treat that provision as weighing against the exercise of the power in that the testatrix, although in a sense she has treated her own property and the appointed fund as a blended fund, must be assumed to have contemplated that the payments in question would be made out of the former. The testatrix then in excessive exercise of her power under the settlement confers on her trustees two powers of maintenance and advancement which involve delegation and the presence of which I must treat as an indication inconsistent with the intention to exercise the power. Finally after giving the trustees power to appoint a solicitor as trustee, she declares that a solicitor-trustee or his firm may make and be paid his or their usual charges. So far I think the indications in favour of and against the exercise of the power are fairly evenly balanced, and that it is difficult to say on which side of the line the case falls. Upon the authorities I should be inclined to say that on the whole there is a sufficient indication

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of an intention to exercise the power, but I am much pressed by the introduction into the concluding part of the residuary clause of the words "if any," because before I can come to the conclusion that the testatrix had the intention of exercising the power I must find that she knew of its existence. She must, I think, have known of the existence of the settled fund, for it was larger than the rest of her estate, but it is difficult to believe that the draftsman of the will knew anything of the settlement or the power. Had he known of the settlement he would probably have made some inquiry whether the testatrix had any power of appointment under it. Did the lady know of the existence of the power? I think not—if she did, I cannot understand why the parenthetical words were introduced, and if she did not, how can I hold that she intended to exercise it?

The result is that, although in the absence of the words "if any" I should have been prepared to hold that the will operated as an exercise of the power, the introduction of these words negatives in my opinion any such intention, and I must so decide.

Solicitors: *A. Walker, New Mills; Parkinson, Slack & Needham, Manchester.*

P. J. B.

C. A.
1923
April 16.

In re SIR JOHN JACKSON.

JACKSON *v.* HAMILTON.

[1922. J. 1524.]

Will—Construction—Gifts to "Domestic servants"—Chauffeur—Coachman—Gardener—Out-door Servants.

Ogle v. *Morgan* (1852) 1 D. M. & G. 359 cannot be treated as a binding decision that, in all cases of bequests to "domestic servants," out-door servants are necessarily excluded from benefiting thereunder.

Under such a gift a testator's coachman and chauffeur, who occupied rooms over the stables and garage respectively, and his gardener, who lived in a cottage provided for him at the testator's country residence, were held entitled to participate.

Decision of Eve J. reversed.

Appeal from a decision of Eve J.

The testator, Sir John Jackson, who died in 1919, by his will dated April 28, 1909, after appointing executors and trustees and giving numerous legacies, including some to the testator's business employees, made the following bequest: "To each of my domestic servants who shall be in my service at the time of my decease and who shall have been in my service for ten years or upwards the amount of four years' wages and to each of my domestic servants who shall be in my service at the time of my decease and who shall have been in my service for three years or upwards but less than ten years the amount of two years' wages."

An originating summons was taken out by the executors for the determination of the following question, and for the following relief:—

1. Whether the respondents William Broughton (the testator's coachman), Arthur Murch (his chauffeur), and Thomas Steele (his gardener) were respectively entitled to any and what legacies under the will.

2. That the respondent Lilian Ellen Hamilton might be appointed to represent for the purposes of the action all persons who were or might thereafter become beneficially interested in the residuary estate of the testator.

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3. That if and so far as might be necessary the real and personal estate of the testator might be administered by the Court.

The respondents Broughton, Murch, and Steele were all of them in the service of the testator at the time of his death, and had been in his service for the respective periods of twenty, sixteen, and six years. During his life the testator had been extensively engaged in business and a large employer of labour therein. He owned a house in London and another in the country, which he occupied alternately from time to time. The coachman and chauffeur accompanied him when he moved from one residence to the other, and occupied rooms over the stables and garage respectively. The gardener lived in a cottage provided for him at the country residence.

On the hearing of the summons Eve J. held, with regret, following *Ogle* v. *Morgan* (1), and other authorities by which he thought he was bound, that the three servants in question being out-door servants, were not entitled to share in the testator's bounty.

The claimants appealed.

Wilfrid Hunt for the appellants. These persons come under the description of "domestic servants." They are servants employed by him in relation to his house, and form part of his domestic establishment: Macdonell on Master and Servant, 2nd ed., 138. The fact of living in the master's house is not conclusive. The older cases are against my contention. It is said that *Ogle* v. *Morgan* (1) is an authority binding on the Court that the term "domestic servants" excludes all out-door servants. That case however does not lay down any binding principle to that effect. It has no doubt been followed in many cases, such as *Vaughan* v. *Booth* (2); *In re Drax* (3); *In re Ogilby*. (4)

The meaning of the term "domestic service" has been discussed in cases under the Unemployment Insurance

(1) 1 D. M. & G. 359.
(2) (1852) 16 Jur. 808.
(3) (1887) 57 L. T. 475.
(4) [1903] 1 I. R. 525.

Act, 1920: *In re Junior Carlton Club* (1); *In re David* (2); *In re Vellacott.* (3) These cases however are not of much assistance in construing wills. They show, however, that the term "domestic servant" should now have a wider interpretation put upon it than it would have received seventy years ago. It is submitted that the appellants come well within the expression.

D. D. Robertson for persons beneficially interested in the residuary estate. No doubt the appellants are servants, but the question is whether they are domestic servants. The authorities show that there is a distinction between in-door and out-door servants. "Domestic servants" must be living in the testator's house. The testator has used words which have obtained a stereotyped meaning: *Vaughan* v. *Booth.* (4) All the text-books have adopted the principle of *Ogle* v. *Morgan* (5) that out-door servants are not domestic servants: Theobald on Wills, 7th ed., 273; 2 Jarman on Wills, 6th ed., 1120.

Bischoff for the executors.

LORD STERNDALE M.R. In this case Eve J. seems to have decided contrary to his own inclination, thinking himself bound by *Ogle* v. *Morgan* (5) and other cases cited in legal text-books as to the meaning attached to the words used in those decisions. He seems to have thought that the draftsman of this will must necessarily have attached the same meaning to them. Now this was the will of a large contractor. It is to be noticed that he bequeaths to his wife his "carriages, motors, wines, jewellery" and other articles "in or about my dwelling house," the word "about" being noticeable. He gives bequests to business employees, in contradistinction to domestic employees. [His Lordship read the bequest in dispute and continued:] The question is whether these three persons are domestic servants. Apart from the authorities, in particular *Ogle* v. *Morgan* (5) and *In re*

(1) [1922] 1 K. B. 166.
(2) [1922] 1 K. B. 172.
(3) [1922] 1 K. B. 466.
(4) 16 Jur. 808.
(5) 1 D. M. & G. 359.

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Ogilby (1), at any rate with regard to the chauffeur and the coachman, I should myself have had no doubt that they were, in the ordinary use of language, domestic servants, living in what was really a part of the testator's house and fulfilling the ordinary functions of domestic servants. With regard to the gardener, there might perhaps be more room for doubt, but, after all, a man who cultivates vegetables for the household and looks after the amenities of the garden, can, I think, be called a domestic servant in the sense that he is employed to minister to the testator's home comfort and enjoyment, even though he does not actually live in the testator's house.

But it is said that there is well established and binding authority, always followed in these cases, which prevents the Court from taking that view. It seems to me that that argument is based upon Lord Truro's decision in *Ogle* v. *Morgan* (2), which is said to have laid down as a fixed principle that an out-door servant cannot be a "domestic servant." In my opinion it does not lay down any such principle, but, if it does, I think it is only a dictum. If it really extends to this, that in any will, under any circumstances, a "domestic servant" can never mean an out-door servant it must be regarded as a dictum only, by which, with the greatest respect, we are not bound, and which I am not myself inclined to follow. But I think it does not really go so far as that. In certain circumstances the words "domestic servants" may include persons such as the appellants here, and we must also remember that during the seventy years which have passed since that decision was pronounced there has been much discussion as to the meaning of the words "domestic servants"; for example in cases which have arisen under the Unemployment Insurance Act. I wish it to be clearly understood that I do not for one moment suggest that the wide definition of the words "domestic servant" adopted under that Act is also to be adopted by the Court in every case of the construction of a will, but I think the discussions which have taken place show that seventy years have perhaps somewhat changed the

(1) [1903] 1 I. R. 525. (2) 1 D. M. & G. 359.

popular meaning of the words "domestic servant," that the same prima facie meaning is not necessarily to be attached to them now as was formerly the case. We must look at the intention of the testator, examining all the circumstances of the case, and, in particular, the fact that in this case he was an employer of other kinds of labour. I think we are entitled to conclude that these three persons are domestic servants for the purposes of this will, and that it was the intention of the testator that they should benefit under it. The appeal must be allowed, and the question asked by the summons answered in the affirmative.

WARRINGTON L.J. stated the facts, and continued: In the absence of authority, I should, without the slightest hesitation, have said that the testator intended to include the appellants under the title of "domestic servants." I think that when a man in the position of this testator talks of domestic servants he intends to include all those who minister to the wants and comforts of himself and his family or the inmates of his household, whether in his town house or his country house; and, dealing more particularly with the gardener, I think he is a man who ministers to the wants and comforts of persons living in a country house, just as, in a different sphere, a cook does.

But we are told that we cannot give effect to these views, because in 1852 Lord Truro, on the construction of another will, made in totally different circumstances, gave a decision to an apparently opposite effect. That was the will of a person who presumably did not employ labour except in regard to his private affairs, such as the maintenance of his private residences or in looking after his estates, whereas in the present case the testator was very largely and very actively engaged in industrial pursuits. Speaking for myself, I rather protest against the doctrine that we must give the same construction to a will as that which has been given to a previous will. I think the Court must say in each case what is the meaning of the particular will before it There may be certain well defined rules of construction, but, speaking generally,

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I think that the decision of a judge upon the construction of one will is not binding upon the construction of another. But the question I ask myself is: did *Ogle* v. *Morgan* (1) lay down any rule of law binding the Court in determining the construction of other wills? It seems to me that it did not. It is said in the text-books that it laid down the rule that an out-door servant is not to be included in the term "domestic servant." But the expression used in that case was not "domestic servant" at all; it was "servant in my domestic establishment." It is true that Lord Truro refers to the difference between out-door and in-door servants, but I think we must take each judgment as referring to the particular words which the Court has there to construe. Later in his judgment Lord Truro says (2): "In my opinion the word" (domestic) "was introduced for the purpose of drawing a distinction between servants who were in the house not receiving board wages, and servants not boarding in the house and receiving proportionately higher wages; otherwise, by including an out-door servant on board wages you would be giving him a vast deal more than those servants who were unquestionably within the scope and operation of the testator's bounty."

That seems to me to have been the dominant factor in Lord Truro's decision, the risk of giving a larger legacy than the testator intended; but, in the first place, I think that the board wages spoken of there ought not to be considered wages at all; they are really a fixed allowance in lieu of food; they are not, strictly speaking, remuneration; whereas wages paid to a gardener, etc., are wages in the proper sense of the term.

I think, therefore, that *Ogle* v. *Morgan* (1) does not lay down as a fixed principle that an out-door servant, not living under the master's roof, is excluded from coming under the expression "domestic servant." I think that we must consider the construction of this will having regard to the actual circumstances, and that each of these persons is entitled to share in the bounty of the testator.

(1) 1 D. M. & G. 359. (2) 1 D. M. & G. 361.

YOUNGER L.J. [after stating the facts:] The testator here carried on a large business with numerous employees engaged in it, and he recognized his obligation to one at any rate of these employees. If there had been no authority upon the point I should have thought that in the will of such a testator the term "domestic servants," in contrast with servants employed in his business, referred to those who were employed by him to minister to the comfort and convenience of his domestic establishment, whether in town or country, irrespective of whether their work was carried on in the house or outside. That would seem to be the natural interpretation of the words in the mouth of this testator. But it is said that in view of the decision in *Ogle* v. *Morgan* (1), and other authorities which followed it, the Court is precluded from attaching that meaning to the words in this will. Now looking first at *Ogle* v. *Morgan* (1) one sees at once how slight is the justification for treating it as a leading case of general application for all time. It was there decided that a gardener must be excluded from sharing in benefits given to "servants in my domestic establishment" by the will of a nobleman, who had obviously no business employees, and of whom it could not be affirmed that he used the expression "domestic establishment" in contradistinction in any sense to his business or any other establishment. In those circumstances it was there held that a gardener who was in receipt of board wages in lieu of food did not participate in the bequest, apparently because it was thought that he could not have been intended by the testator to receive a sum so greatly in excess of that payable to the testator's in-door servants, who being dieted in the testator's household and at his expense, received wages proportionately smaller in amount. It is said now that a decision based upon a ground so narrow is to govern all future decisions on this question, arising on all wills, whatever the circumstances of the testator, provided only that the same or similar words are used therein. With the other members of the Court, I think that that cannot be so. At the same time I agree with what has been said by my Lord

(1) 1 D. M. & G. 359.

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that neither are we bound by the decisions as to the meaning of the expression "domestic servants" in cases under the Unemployment Insurance Act. On the whole, however, looking at the wording of this will in view of all the relevant circumstances of the case, I am of opinion that these appellants are entitled to share in this gift.

Appeal allowed.

Solicitors: *Batten & Co., for all parties.*

G. A. S.

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PRICE *v.* RHONDDA URBAN DISTRICT COUNCIL.

[1922. P. 2764.]

Education—Public Elementary School—Married Women Teachers—Dismissal—Notice—Insufficiency—Validity of Ground of Dismissal—Contract—Want of Consideration and Mutuality—Statutory Powers of Urban District Council—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 35—*Sex Disqualification* (*Removal*) *Act*, 1919 (9 & 10 *Geo.* 5, *c.* 71), *s.* 1.

The plaintiff was a married woman teacher suing on behalf of fifty-seven other married women teachers in the district of the defendant Council, who were employed under contracts entered into on April 1, 1919. On December 3, 1919, the Education Committee of the defendant Council unanimously passed a resolution that the engagements of married women teachers under their authority be terminated, provided that teachers who had not completed the minimum period of recorded service prescribed by the School Teachers (Superannuation) Act, 1918, should be allowed to continue up to the date of such period of recorded service; and notice was accordingly given to the teachers affected by the resolution to terminate their engagements on July 31, 1920. On September 20, 1920, a circular from the Education Committee headed "Termination of Engagements" was sent by B. as Director of Education to the plaintiff and the other teachers referring to the resolution of December 3, 1919, and stating that their engagements would terminate automatically on the date when the period of minimum recorded service expired, and asking them to state the dates upon which they would respectively complete the period of recorded service entitling them to a pension. Replies were received from all the teachers giving the required information.

On July 7, 1922, the Education Committee passed a resolution by a majority of twenty-five to three that, having regard to the large number of certificated teachers who would complete their course of training in the month of July without any prospect of securing employment, the authority took into consideration the advisability of

terminating the engagements of all married women teachers (other than those there specified), and the Director was authorized to give all the married women teachers thereby affected notice to terminate their engagements on October 31 then next. The resolution was duly confirmed by the Council. Accordingly on July 24, 1922, B. as Director of Education gave notice by letter to the plaintiff and the other teachers terminating their engagements on October 31, 1922, the notices to the head teachers being for three months as from August 1, that to the assistant teachers as from October 1. Under clause 75 of the regulations for the district head teachers were entitled to receive three and assistant teachers one calendar month's notice, every notice to be given on the first day of a month. In an action by the plaintiff claiming a declaration that the notices of July 24, 1922, were invalid on various grounds, and for an injunction to restrain the defendant Council from acting on them :—

Held (1.) That it was not possible to construe the circular of September 20, 1920, as a new offer of employment down to a particular date, and that even if it were such an offer there was no enforceable contract created, as there was no mutuality in the suggested modification, and no consideration for the concession.

(2.) That the authority of B. was limited to communicating the resolution, and he had no authority to make the alleged offer on behalf of the Council.

(3.) That under s. 35 of the Elementary Education Act, 1870, the statutory powers of the education authority must be so exercised as to make the tenure of the engagements at the pleasure of the Board, although reasonable notice might properly be provided for in contracts with teachers so engaged.

(4.) That the resolution of July 7, 1922, dismissing the married women teachers was passed in exercise of the statutory powers and duties of the Council, and the preface to the resolution indicating the desire to put an end to unemployment was inserted bona fide in the honest belief that they were acting in the best interests of the schools in their district, and the Court had no jurisdiction to review their decision.

(5.) That the resolution was not invalid as against public policy, or contrary to the letter and spirit of the Sex Disqualification (Removal) Act, 1919.

(6.) That although the notice of July 24, 1922, only became effective on October 1, to expire on October 31, and was therefore not a proper notice within clause 75 of the Regulations, that objection was not open to the plaintiff on the pleadings as they stood, and the Court was not entitled to adjudicate upon it. The action would accordingly be dismissed with costs.

ACTION with witnesses.

In 1897 the plaintiff, Elizabeth Price, was first engaged as an assistant teacher at a public elementary infant school at Cwm Clydach in the district of Ystradyfodwg in the county

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of Glamorgan. The defendant Council was the Education Authority for the district where the plaintiff was now employed. The form of the action, the declarations asked and the relevant facts are taken in substance from the judgment of the Court.

Elizabeth Price was originally the sole plaintiff in this action, and by the writ, issued on October 24, 1922, she claimed: "A declaration that a notice dated July 24, 1922, served upon the plaintiff by or on behalf of the defendant Council, and purporting to terminate her engagement as a teacher under the defendant Council as an education authority, was not binding on the plaintiff and was invalid"; secondly, "An injunction to restrain the defendant Council from acting on the said notice or attempting or purporting to enforce the same or any alleged right thereunder"; and thirdly, "damages"; and fourthly, "further or other relief." On the hearing of an application for an interlocutory injunction the writ of summons was amended by making the plaintiff, Mrs. Price, sue "On behalf of herself and all other school teachers now or lately employed by or acting under the Rhondda Urban District Council as an education authority whose names and addresses have been delivered to the defendant Council by the plaintiff they being married women and having received notices dated on or about the 24th July, 1922, purporting to terminate their engagements with the Council." At the same time the form of declaration claimed was enlarged so as to meet the altered circumstances; the claim for damages was struck out, and thereupon the defendants by their counsel undertook until judgment in the action or further order, "Not to put into operation as regards the plaintiff and all other married women teachers in the area covered by the defendants whose names and addresses have been delivered as in the said Writ mentioned, notices purporting to terminate their engagements, but to allow the plaintiff and such other school teachers to continue to perform their alleged duties." No further order was made on the motion except that the costs should be costs in the action.

The persons on whose behalf the plaintiff sued were

fifty seven in number; they were all married ladies whose husbands were alive and not incapacitated from being able to support their wives. Some of them were head teachers, and some assistant teachers, in the employ of the defendant Council as the education authority for the Rhondda District, and at the first date relevant for this litigation were so employed under contracts which must be deemed to have been entered into on or about April 1, 1919. The plaintiff and the other teachers had however all been employed (and many of them for several years) prior to March, 1919, and on the first day of that month, in consequence of certain disputes which had arisen between the Council and the teachers, all the teachers had by appropriate notices determined their employment by the Council. The disputes were in process of adjustment when the end of March was reached, and on April 1 the teachers returned to their respective duties and their employment by the defendants was resumed as from that date.

Under s. 35 of the Act of 1870 the employment was at the pleasure of the Educational Board and, by clause 75 of the Regulations for the management of schools in force in this district, the engagements of the teachers were determinable on either side by notices to be given on the first day of a month, such notices to be in the case of head teachers three calendar months, and in the case of assistant teachers one calendar month. So matters remained; the defendants asserted further that the engagements of all the teachers were determined on October 31, 1922, by the notices referred to in the amended writ. It is necessary, however, to state the matters that occurred prior to 1920 and the facts which ultimately led to the passing of the final resolution. In the case of married ladies it not infrequently happened that they had to absent themselves for several months from their duties as teachers. The majority of the members of the defendant Council, in common with the members of other educational authorities all through the country, had for some time past maintained a view adverse to the employment of married women as teachers; and on November 6 and 12,

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1914, the following resolutions were passed by the Educational Committee and adopted by the Council. The resolutions were these: "(*a*) That the engagement of all married women certificated teachers in the service of the authority at the date of the adoption hereof shall terminate at the end of five years from such date; provided that any such teachers who shall not then have completed the minimum period of recorded service prescribed by the Elementary School Teachers (Superannuation) Act 1896 shall be allowed to continue in the service of the Authority up to the date of the completion of such period of minimum recorded service. (*b*) That the engagement of all married women uncertificated assistant teachers in the service of the Authority at the date of the adoption hereof shall terminate at the end of five years from such date, provided that any such teachers who shall not then have completed the age of 45 years shall be allowed to continue in the service of the Authority up to the date of the completion of such age." This resolution appeared to have been communicated by the Director of Education to the head teachers and through them to the assistant teachers, employed by the Authority, and they were requested to fill up a skeleton form which was to put the Authority in possession of such particulars as were deemed necessary to be ascertained in order effectually to carry out the resolution.

Matters remained like that during the five years; but in November, 1919, when the five years expired, the matter came up for reconsideration, and on December 3, 1919, the Authority unanimously resolved that the resolution should "be varied and amended by the substitution of the following," which was in these terms: "That the engagement of all married women certificated and uncertificated teachers in the service of the Authority be terminated; provided that any such teacher who has not completed the minimum period of recorded service prescribed by the School Teachers (Superannuation) Act 1918 shall be allowed to continue in the service of the Authority up to the date of the completion of such period of minimum recorded service," and then,

secondly, "That the Director be authorized to give all married women teachers immediately affected by the foregoing resolution notice in due course to terminate their engagements on the 31st July next, that being the end of the Education School Year." The report of the Education Committee was adopted by the Council on December 10. At a much later date in the course of the next year August 31 was substituted for July 31 for the termination of the engagements of the married women to whom the resolution was immediately applicable, it being felt that they were entitled to the salary for what would have been the vacation month had their employment been continued beyond July 31. But, subject to that, notices were served, and on August 31, 1920, the engagements of the married women to whom the resolution as varied on December 3 was immediately applicable, were determined by the Authority.

Having thus carried out the resolution so far as it was immediately applicable, the Director of Education, without, according to the evidence, any further express instructions from the Education Authority, proceeded to take steps to acquaint the other married women, who in due course would become immediately affected by the resolution, of the terms of the resolution, and requested them to give him such information as would enable him to inform himself and the Authority of the due dates at which the resolution would become applicable to the other married women. On September 20, 1920, he issued a document from the Education Committee's office headed "Termination of Engagements," and in these terms: "Dear Madam, I beg to call your attention to the following resolution of the Authority." He then set out the resolution of December 3 as follows: "That the engagement of all married women certificated and uncertificated teachers in the service of the Authority be terminated; provided that any such teacher who has not completed the minimum period of recorded service prescribed by the School Teachers (Superannuation) Act 1918 shall be allowed to continue in the service of the Authority up to the date of such minimum recorded service. I have therefore to

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state that your engagement will terminate automatically in accordance with the above resolution on the date on which the period of minimum recorded service will expire. Please acknowledge the receipt of this circular letter and state the exact date upon which you will complete the minimum period of recorded service to entitle you to a pension. Yours faithfully, T. W. Berry, Director of Education."

In response to this circular there was supplied to Mr. Berry information in letters by all these ladies. The married ladies, it was known, had in many instances been absent from their duties for periods in some cases of six months, in others nine months, and the question was raised whether those periods of absence should be calculated in ascertaining the qualifying years for superannuation allowances. That question was cleared up in the course of the following year, and on October 26, 1920, in consequence of the way in which that question had been answered, it became necessary for Mr. Berry to communicate further with these ladies, and accordingly on October 26, 1920, he wrote them another circular as follows: "Dear Madam, I have been in communication with the Board of Education as to whether the absence of married women teachers under Article 82A of the Authorities Regulations could be considered as service for the purpose of the School Teachers (Superannuation) Act, 1918, and have had a reply stating that such periods of absence cannot be regarded as such. Before I can come to a decision as to the date on which your engagement will be terminated in accordance with the resolution of the Authority I shall be glad if you will kindly let me have particulars of any absences (if any) in your case under the Regulation above referred to. The present regulation provides for a period of absence of nine calendar months but a previous regulation provided for a period of absence of six calendar months. A statement showing the exact date of commencing and ending of the respective periods must be given and must be certified by the Head Teacher of the School at which you were then serving." There again in response to this Mr. Berry received all the information, and having obtained answers to those

documents he was in a position, subject to any future absences which might become necessary, to ascertain and to inform the Authority of the exact dates when the periods of service of these ladies would end for the purpose of qualifying them for the superannuation allowances.

The notice of July 24, 1922, was given in consequence of final resolutions passed by the defendant Council on July 7, 1922. The first resolution was as follows: "That having regard to the large number of certificated teachers who will complete their course of training in the month of July without any prospect of securing employment, this Authority takes into consideration the advisability of terminating the engagements of all married women teachers, other than those married women teachers who are now in the employ of the Authority on compassionate grounds." This resolution was carried by twenty-five votes to three; and a second resolution was then passed that the director be authorized to give all married women teachers affected by this resolution notice terminating their engagements on October 31, 1922.

The plaintiff, Mrs. Price, was the only witness called for the teachers, and deposed to having received the circulars of 1920 and replied to them, and she considered that the present engagement was on the terms contained in the circulars.

For the defence Sir Walter Nicholas, the Clerk to the defendant Council, stated that for some years past the Council had considered the question of the married women teachers, and finally on educational grounds decided that it was undesirable to retain them having regard also to the large number of teachers who were leaving the training colleges and for whom there would be no places.

Councillor Abel Jacobs, who proposed the resolutions of July 7, 1922, and was a former chairman of the Council, was also examined, and testified that the periodical temporary absences of married teachers was not beneficial from an educational point of view and most inconvenient. as substitutes had to be found.

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Mr. Mark Harcombe, another ex-chairman, gave similar evidence that in his view the employment of married women teachers was detrimental to the schools, and that Mr. Berry had no authority to alter the terms on which teachers were engaged. Another witness was Principal Thomas, a director of a training college for school mistresses, who said that there were about 1000 teachers from various colleges now unemployed, and that this fact would prevent parents from sending their children to be trained, with the result that there would be a dearth of teachers in the future. It was vital to provide places for students. The various points arising on the pleadings sufficiently appear from the arguments and the judgment.

Gover K.C., *John M. Stone* and *A. T. James* for the plaintiff. The plaintiff and the other teachers accepted the notices of September 20, 1920, which permitted them to remain in their posts until the end of the qualifying period entitling them to their superannuation allowances. That amounted to a new contract of service or at any rate a variation of the former contract. The notices of July 24, 1922, were bad :—

1. Because insufficient in point of length, not being for a full calendar month, and they did not comply with the admitted terms of employment.

2. Because (*a*) the avowed grounds on which they were based being economical and not educational were ultra vires, and could not properly be supported as an exercise of their statutory duties by the defendants, (*b*) because they were also in pursuance of grounds contrary to public policy and in restraint of marriage, and (*c*) because they were in breach of the letter and spirit of the Sex Disqualification (Removal) Act, 1919.

3. That the minutes of December 10, 1919, and the circular letter of September 20, 1920, and the letters from the teachers in reply constituted either a new contract of employment for a period corresponding to the minimum period of recorded service, or else a modification of the existing agreement of

service by the abandonment of any right by the Council to determine their employment before the expiration of the minimum period of service.

4. That the new or varied agreement was neither ultra vires nor bad, as alleged by the defence, by reason of not being under seal, or as not complying with the Statute of Frauds, or from want of consideration or mutuality.

5. That the notices of July 24, 1922, were in any case bad, as being given on the discretionary authority given by the Council to Mr. Berry and in pursuance of an improper delegation to him of the powers and duties of the Council.

On the first point, as to the insufficient length of the notice given, clause 75 of the Regulations for the District is conclusive. It must be a full three months' notice in the case of head teachers and one full month in the case of assistant teachers; and the notice in either case must be given on the first day of the month. That was not done, and on the authorities it is a fatal objection: Norton on Deeds, ch. x., p. 154.

The principle on which the Courts proceed in cases of notices to quit is laid down in many cases: *Doe* v. *Timothy* (1); *Quartermaine* v. *Selby* (2); *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association* (3); *Radcliffe* v. *Bartholomew* (4); *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* (5); *In re Railway Sleepers' Supply Co.* (6) On the second point (*a*) if a public body avow the reason for dismissing a person employed by them and it is an improper one the Court will go into the question of the validity of the reason. The relevant section is s. 35 of the Elementary Education Act, 1870 (re-enacted in s. 48 of the Education Act, 1921), and power is given to the School Board to engage teachers to hold office during the pleasure of the Board, and from time to time to remove them; and where the constitution of a school gave an unfettered power of dismissing teachers to a

(1) (1847) 2 Car. & Kir. 351.
(2) (1889) 5 Times L. R. 223.
(3) [1891] 1 Q. B. 402.
(4) [1892] 1 Q. B. 161.
(5) [1904] 1 K. B. 1, 4.
(6) (1885) 29 Ch. D. 204.

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governing body, the Court declined to interfere: *Hayman* v. *Governors of Rugby School* (1); *Wright* v. *Marquis of Zetland.* (2) The reason for dismissal in the present case was to ameliorate unemployment. If an irrelevant reason is given the Court can act: *Reg.* v. *Adamson* (3); *Rex* v. *Board of Education.* (4)

There are cases where there is jurisdiction to interfere, as where a vestry has not properly exercised its discretion the Court can compel them by mandamus to do so: *Reg.* v. *Vestry of St. Pancras* (5); *Board of Education* v. *Rice.* (6) The authority in the present case was acting in a fiduciary capacity: (*b*) The notices were also in restraint of marriage generally, if so it would be against the policy of the law, as James L.J. stated in *Allen* v. *Jackson.* (7) (*c*) They further infringed the letter and spirit of s. 1 of the Sex Disqualification (Removal) Act, 1919 (9 & 10 Geo. 5, c. 71), which removes all disqualification on women for the exercise of any public function. The only case decided under that Act is *Viscountess Rhondda's Claim.* (8)

Thirdly, there was a new contract of service effected by the resolution of December 3, 1919, and the circular letter to the teachers of September 20, 1920, and the letters received in reply. The teachers continued on that new footing; the old agreement was automatically terminated according to the circular, which was headed "Termination of engagements." Fourthly, this new agreement was neither ultra vires nor bad under the Statute of Frauds or for any other reason as pleaded in the defence. Fifthly, the notices were bad on the ground of the delegation of its authority by the Urban District Council to Mr. Berry. There was no power to delegate their discretion: *Nelson* v. *James Nelson & Sons* (9); *Davies* v. *Ebbw Vale Urban Council* (10); and *Cook* v. *Ward.* (11)

(1) (1874) L. R. 18 Eq. 28.
(2) [1908] 1 K. B. 63.
(3) (1875) 1 Q. B. D. 201.
(4) (1910) 8 L. G. R. 549.
(5) (1890) 24 Q. B. D. 371.
(6) [1911] A. C. 179, 186.
(7) (1875) 1 Ch. D. 399, 403.
(8) [1922] 2 A. C. 339.
(9) [1914] 2 K. B. 770.
(10) (1911) 9 L. G. R. 1226.
(11) (1877) 2 C. P. D. 255.

Upjohn K.C., *Clayton K.C.* and *A. A. Bethune* for the defendants. Our first and main point is that there was no binding contract in fact by the documents which passed between the parties in September and October, 1920. The resolution of the Council was not a contract, and the letter of Mr. Berry was not a contract or an offer or promise, but only an inquiry for information as to the period of service. Secondly, if there were a promise, or an offer, Mr. Berry had no authority from the Council to make it. Thirdly, there was no consideration for it or mutuality of promise. Fourthly, the contract was not under seal and therefore not binding. Fifthly, there was no memorandum of it within the Statute of Frauds; and sixthly, any such contract as was suggested would be void under the Education Act, 1870, as ultra vires. It was suggested by the plaintiffs that the notices of July 24, 1922, were of insufficient length, but that was not open to them on the pleadings and the particulars given. Our submission is that the notices are binding, and the only remedy, if any, was damages which are not now claimed in this action. A second and important argument for the plaintiffs was that the avowed ground of dismissal was for an economical and not an educational reason, but that is not borne out by the evidence of the chief witnesses for the defence. It was a matter for the Council to judge. The cases of *Hayman* v. *Governors of Rugby School* (1) and *Wright* v. *Marquis of Zetland* (2) show that the Court will not interfere with a properly constituted authority when acting bona fide. The rule was laid down in *Reg.* v. *Vestry of St. Pancras.* (3) It was also alleged that the notices were against public policy and contravened the provisions of the Sex Disqualification (Removal) Act, 1919.

[EVE J. I do not call upon you as to these two points.]

There is, we submit, no consideration for the alleged new contract, no mutuality and no memorandum to satisfy the Statute of Frauds: *Hanau* v. *Ehrlich* (4); *Wain* v. *Warlters*, 1 Smith's Leading Cases, 12th ed., p. 361;

(1) L. R. 18 Eq. 28.
(2) [1908] 1 K. B. 63.
(3) 24 Q. B. D. 371.
(4) [1912] A. C. 39.

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Williams v. *Jordan* (1); *Lovesy* v. *Palmer*. (2) A contract of this character must be under seal: *Austin* v. *Bethnal Green Guardians* (3); *Reg.* v. *Governors of Darlington School* (4); *Smith* v. *Cartwright*. (5) The Council had no power to delegate their authority to Mr. Berry. The Regulations as to the giving of notices are merely directory.

[They also referred to *Reg.* v. *London County Justices* (6); *Liverpool Borough Bank* v. *Turner* (7); and on the question of jurisdiction generally to *Weinberger* v. *Inglis*. (8)

Gover K.C. in reply referred to *Page* v. *More*. (9)

EVE J. [after stating the facts substantially as set out above continued:] I propose to deal first with that part of the plaintiffs' case which raises the issue whether in July, 1922, when these notices were given, it was competent for the defendants to determine the engagement of any one of the plaintiffs.

Put shortly, the contention of the plaintiffs, on this part of the case, is that their contracts of service of April 1, 1919, had been so modified in September and October, 1920, as that the defendant authority from that time forward had no continuing power to determine their engagements by notice under clause 75 of the Regulations for the District. [His Lordship then stated the various matters which took place prior to 1920 and read the circulars sent by Mr. Berry.] The plaintiffs contend that the documents which I have read and in particular that of September 20, 1920, constituted an offer to those to whom it was addressed to modify their terms of service, and that upon the receipt of that offer each married woman who continued (and in fact they all continued) in the service of the Authority thereby accepted the offer and entered into a contract for employment upon terms different from those theretofore subsisting, the difference being this, that as from the acceptance of that offer the

(1) (1877) 6 Ch. D. 517.
(2) [1916] 2 Ch. 233.
(3) (1874) L. R. 9 C. P. 91.
(4) (1844) 6 Q. B. 682.
(5) (1851) 6 Ex. 927.
(6) [1893] 2 Q. B. 476.
(7) (1860) 2 D. F. & J. 502.
(8) [1918] 1 Ch. 517; [1919] A. C. 606.
(9) (1850) 15 Q. B. 684.

engagement could not be put an end to by the Authority under clause 75, but so far as the Authority was concerned, must continue until the teacher had qualified for her superannuation allowance.

This question, put in the forefront of the plaintiffs' case and strenuously argued, involves consideration of a number of points. To begin with, the document of September 20 must be capable of being construed as an offer made to these ladies. I think it is extremely difficult to extract anything of that nature from the document. It looks rather as if it were the communication of a resolution having an immediate effect so far as it concerned certain persons and a possible effect in the future as regards others. The part of the resolution relating to married ladies immediately affected was no concern of the recipients of this circular; those ladies had all been dealt with, their engagements had been determined and the resolution had been given effect to. The plaintiffs were interested only in so much of the resolution as is contained in the proviso, that is to say in the statement that the Council at the date of the resolution were not contemplating giving notice to any teacher who had not completed the minimum period of recorded service, and that she was to be allowed to continue the service down to the date of such minimum recorded service.

That was the only part of the resolution which affected these ladies, and it was communicated to them by the Director of Education in this circular. Each was asked to acknowledge the receipt of it and to give such information as would enable the Director to ascertain the date at which the resolution would become effective in her case. In my opinion, it is not possible to construe this circular as an offer of employment down to a particular date, which if accepted was to deprive the Council of their power to determine the employment before that particular date. I think this part of the plaintiffs' case fails in limine by reason of there not being that which is the first essential in the formation of a contract by offer and acceptance; there is no offer here. But assuming that I am wrong in this view, and that this

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circular does constitute such an offer as the plaintiffs contend for, and that continuance in the employment operated as an acceptance of such offer, the next question is whether any enforceable contract resulted. The first difficulty is this: where is there any consideration or mutuality? It is not as if the plaintiffs' case was that the Authority thereby agreed to employ and the teachers on their part agreed to serve the Authority down to the particular date. On the contrary the only modification suggested is one abrogating the power of the Authority to determine the engagement, each teacher retaining her right to determine her service by notice under clause 75. There is no mutuality in the suggested modification and no consideration for the concession. Then again, who is it who is put forward as making the offer, and what evidence is there of his authority either to make the offer or bind the Authority by the resultant contract? Mr. Berry occupied the position of Director of Education. Not only is there no evidence that he was so authorized, but on the contrary I have very cogent testimony proving that he was not. So far as the proceedings of December, 1919, are disclosed in the minutes of the Council, Mr. Berry's authority was limited to communicating the resolutions in question to those teachers to whom they would be immediately applicable. It is impossible to read the second resolution of December, 1919, as authorizing him to issue this circular to married ladies to whom the resolution had no immediate application. There is no record in any of the minutes to show that the authority of December was ever extended, and I have the evidence of the responsible officer of this committee and of members exercising considerable influence in the committee that in fact not only was no authority given to Mr. Berry to issue this circular, but that the fact of his having so done was wholly unknown to them or, as far as is known, to any other member of the committee until nearly two years after it had been issued. Contracts purporting to be entered into by persons acting as agents are always liable to be defeated if the principal can satisfy the Court that the agent had no authority, and I am quite

satisfied that even if this were an offer which resulted in a contract it was a contract which Mr. Berry had no authority to enter into on behalf of the Council. A further point taken on behalf of the defendants raised the question whether the Authority could legally have made such a contract. Sect. 35 of the Act of 1870 gives to the Education Authority statutory power to engage and to dismiss officers, including teachers, and the section clearly provides that the statutory power must be so exercised as to make the tenure of the engagements at the pleasure of the Board. I should not be prepared to hold that the insertion in an agreement of service of a stipulation for a reasonable notice before it could be determined was ultra vires of the Authority. Educated persons are not to be dismissed at a moment's notice from responsible positions. Reasonable notice may properly be provided for in the contracts with persons engaged under s. 35, but it is a very different thing to say that the Authority could legally have bound itself to retain the services of each and all of these ladies until they had respectively completed the minimum period of recorded service. Had there resulted from the events which happened a contract purporting to bind the Authority, I should have been prepared to hold that such a contract entered into indiscriminately with all the teachers, irrespective of the varying length of the several periods for which it might bind the Authority, would have been beyond the statutory powers of the Authority under s. 35. The result is that, in my opinion, there is no substance in the point that the contracts of service of these married ladies were varied by what took place in September and October, 1920, and accordingly, I must treat them as being in 1920 in the same positions as they were during the period between April 1, 1919, and September, 1920. After this last mentioned date nothing more occurred for some time. But in or about the month of July in each year a number of qualified students leave the training colleges to take up appointments as teachers, and in 1921 and 1922 the number of available qualified students was largely in excess of the demand for them. This excess, due partly, as one very capable expert witness

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stated, to the frantic appeals which the Education Authorities had made in previous years to persons to enter the profession and partly to the reduction of teaching staffs to secure economy, unfortunately involved the unemployment of a large number of capable teachers whose parents had expended considerable sums in educating them for this particular profession, and was a matter which was engaging the serious attention of this and other Authorities in the country.

Consequent on this state of affairs the campaign for replacing the married women teachers by some of the qualified candidates waiting for engagements was again started. On June 2, 1922, notice was given of an intention to bring forward before the Education Authority a resolution to the effect that "having regard to the large number of certificated teachers who will complete their course of training in the month of July without any prospects of securing employment, this Authority takes into consideration the advisability of terminating the engagements of all married women teachers." The matter was not dealt with in undue haste. It came before the Education Committee on June 7. It stood over for a month, and in the course of that month the Director of Education was instructed to obtain information which the Education Committee desired to have before coming to a decision upon the motion. Ultimately on July 7 the resolutions I am about to read were passed by a large majority. There were twenty-eight members of the Authority present and voting, of whom twenty-five voted in favour of and three against the resolutions. The first was in these terms: (1.) "That having regard to the large number of certificated teachers who will complete their course of training in the month of July without any prospects of securing employ ment, this Authority takes into consideration the advisability of terminating the engagements of all married women teachers other than those married women teachers who are now in the employ of the Authority on compassionate grounds and with the reservation that nothing in this resolution is to preclude the Authority from engaging in the future any married women teachers on similar grounds." The exception

introduced into that resolution is intended to apply to the cases of widows, and married women whose husbands were alive but unable, owing to accidents or ill health, to support them. The resolution goes on: "That the Director be authorized to give all married women teachers affected by the foregoing resolution notice in due course to terminate their engagements on the 31st day of October next." That is the resolution to which effect purports to have been given by the notices to which I shall refer presently.

The first objection taken to this resolution is that it is not founded on any considerations relevant to the statutory duties and powers of the Authority in that it is directly and solely prompted by a desire to put an end to unemployment without any reference to the question whether the method adopted for so doing would or would not benefit the schools, the support, maintenance and efficiency of which is the primary duty of the Authority.

Argument has been addressed to me on the question whether the Authority in engaging and dismissing its employees is to be regarded as acting in a fiduciary capacity, but I do not think it necessary to deal fully with these arguments, because in my opinion it is sufficient to point out that this body, being a statutory body entrusted with statutory powers, can only exercise those powers for the purpose and with the object of giving effect to the statutory duties imposed upon it, and as one must assume that in dismissing employees or in doing any other administrative act or adopting any particular policy consistent with the powers conferred upon it it acts in good faith, it lies upon those who assert the contrary to establish the truth of that assertion if they can. Had the Council passed this resolution without any introductory words, the plaintiffs would not have had anything in the recorded proceedings suggesting any other motive for the course adopted than that of discharging the statutory duty of maintaining efficiency in the schools, and they could not have succeeded in impugning the validity of the resolutions unless they could have proved that they were ultra vires of the Authority or had been passed corruptly, by which

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is meant not in good faith with the intent to keep the schools efficient but for some other alien or irrelevant purpose. But the plaintiffs are not left in this difficulty, because the Authority has prefaced the resolution with an introduction indicating its reasons, and having so done has left it open for the plaintiffs to urge, as they do urge, that such reasons are not only insufficient to justify the resolutions but demonstrate that they were passed for some motive other than a desire to maintain the efficiency of the schools. No doubt if no reasons be given, it rests with those who attack the action of the statutory body to prove that such action is ultra vires or corrupt in the sense which I have already indicated, but when reasons are given it is open to those who lead the attack to impugn the sufficiency of the reasons, and to invite the decision of the Court on the issue thus raised. Taking first the resolution as it stands, ought any tribunal to say that it necessarily involves an abuse by the Authority of its powers?

It is not worded perhaps with that clearness which would remove all doubt upon the point, but can it be said that the introductory statement, confined, be it observed, to the position of persons about to devote their lives to the furtherance of the work the supervision of which rests with the Authority, is of sufficient ambiguity to raise a reasonable doubt whether the Authority is moving lawfully or is exercising its powers for some unconstitutional object? I think not. Apart from all the evidence I have heard and on the wording of the resolution alone I should not be prepared to hold that it discloses an intention on the part of the authority to relieve unemployment without reference to the question whether such relief would advance or retard the purposes for which the Authority exists.

But the matter does not rest there. The plaintiffs having attacked the bona fides of the resolution on the ground that it was based on an intent to find employment for the unemployed and without any regard to the educational efficiency of the district, evidence has been given by those who are attacked in support of their bona fides as the

responsible Education Authority, and upon such evidence I am quite satisfied that, rightly or wrongly, a conclusion was come to that more harm would be done to the cause of education in the district by the continued unemployment of a large number of competent teachers than by eliminating the married women from the ranks of the employed teachers.

It is not for me to express any opinion upon that conclusion; all I have to do is to decide whether or not the Authority acted honestly and within their powers in reaching it. I think they did; and however much I may regret the result to the plaintiffs which follows from that decision it leaves me no alternative but to treat the resolution as one within the statutory powers of the Authority and one which I have no jurisdiction to review.

Other objections were taken to the resolution. First, it was said that it is against public policy in that it is in restraint of marriage. I do not think so. It would, in my opinion, be pressing public policy to intolerable lengths to hold that it was outraged by this Authority expressing a preference for unmarried women over married women as teachers, in view of the fact that the services of the latter are frequently not continuous but are liable to be interrupted by absences extending over several months. Then it was argued that there is something in it contrary to the Sex Disqualification (Removal) Act. I cannot accept that view. The Act, as appears from its title, is an Act to remove certain disqualifications arising from sex, and I am not prepared to hold that an Authority commits a breach of that Act if in some of its appointments it indicates that applications from one sex only can be received. Consider the absurdity to which such a conclusion might lead. The medical Authority might require the services of a monthly nurse. Would they be committing a breach of the Act were they to intimate that no ex-service man or superannuated officer need apply? Lastly it is said that the Authority delegated the exercise of its power to determine the engagements to Mr. Berry. How does that stand? The resolution I have been dealing with

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having been passed Mr. Berry purported to give certain notices thereunder. It is said that under the second resolution it was left open to him either to give or abstain from giving the notices. I cannot accept that view. One cannot read these two resolutions without seeing that the Council, as the Education Authority, first determined on the expediency of the step which they were about to take and then fixed the date upon which the resolution was to have effect given to it. Having so done, Mr. Berry was instructed to take the necessary steps to bring about the results intended, and there is really no substance in this point. Mr. Berry accordingly gave the notices in these terms: "Rhondda Urban District Council Education Committee, July 24, 1922. Dear Madam, I am instructed by the Education Authority to give you one month's notice from October 1, 1922, to terminate your engagement on October 31, 1922, as a teacher under this Authority. Yours faithfully, T. W. Berry, Director of Education."

In my opinion, according to the true construction of that document it only became an effective notice on October 1, 1922. I think it is impossible to read the document as a notice given on July 24 to terminate the engagements on October 31. At all relevant dates the plaintiffs were still subject to clause 75 of the Regulations, and were entitled to receive, in the case of head teachers, three, and of assistant teachers, one calendar month's notice. The notices therefore of October 1 purporting to expire on October 31 were not proper notices, and if the matter rested there I think it is obvious that the engagements of the plaintiffs were not put an end to by those notices. But is it open to the plaintiffs on the pleadings as they stand to raise this point? This is a matter on which I have felt great difficulty. [His Lordship discussed in detail the pleadings, the applications for particulars, and the points raised in the action, and came to the conclusion that the plaintiffs were not proposing to rely on mere matters of form or technical matters of that sort, but were going upon the substantial matters in certain specified paragraphs of the claim.] In these circumstances, although

if it had been open to the plaintiffs I should have been prepared to hold that there were no effective notices to determine their engagements, I feel that I am not entitled to adjudicate on that matter between the parties. This really disposes of the action, which must be dismissed. It only remains for me to say that no one can feel anything but very genuine sympathy for these ladies, and I earnestly hope that the Authority will take into consideration the question whether it is not possible to alleviate the hardship which results from its action, at any rate, in those cases where the teacher has a comparatively short period to serve before becoming entitled to the superannuation benefit. The action will be dismissed with costs.

Solicitors: *Helder, Roberts, Giles & Co., for Davies & Co., Pontypridd; Smith, Rundell & Co., for Bruce & Nicholas, Pontypridd.*

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[1923. W. 2031.]

Landlord and Tenant—Notice to quit—Tenant holding over—Subsequent Acceptance of Rent—Statutory Tenancy—Action by Tenant to recover Possession—Damages—Costs in High Court—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 16, *sub-s.* 3; 17, *sub-s.* 2.

In an action by a weekly tenant for the recovery of possession of his rooms which had been taken possession of by the defendant, his landlady, on the allegation that he had given her notice to quit, the Court held, on the evidence, that the notice to quit was insufficient, and the entry by the defendant improper. Judgment was given for the plaintiff with forty shillings damages.

A year before this action the defendant had given the plaintiff notice to quit, but he had remained on as tenant and the defendant had received rent for twelve months from the expiration of this notice to quit:—

Held, that the plaintiff was in the position of a statutory tenant and this action was a proceeding arising under the Rent Restrictions Act. 1920; and inasmuch as the action might have been brought in the

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county court pursuant to s. 17, sub-s. 2, of that Act, and s. 16, sub-s. 2, was inapplicable having regard to the decision in *Shuter* v. *Hersh* [1922] 1 K. B. 438, the plaintiff was not entitled to the costs of the action in the High Court.

MOTION with witnesses.

This was a motion with witnesses by a weekly tenant to recover possession, and it was treated as the trial of the action.

The plaintiff, Robert Wolff, was a violinist occupying certain rooms or maisonette at 32 Oxford Gardens, North Kensington, as a weekly tenant, paying 1*l.* 0*s.* 7*d.* a week. This rent had been regularly paid down to and including April 28, 1923. On May 12, 1923, the plaintiff informed his landlady, the defendant Alice Smith, that he proposed to go to Hastings for a short stay to recruit his health, and that if he could obtain a suitable permanent employment there as a violinist he might eventually stay there and arrange to leave the flat. On May 15 he left for Hastings, leaving his rooms securely locked up and containing his furniture. He returned on May 27 to find all his furniture removed, the premises locked against him, and the defendant making certain decorative repairs. A letter from the defendant's son was pinned on the dining-room door stating that as the plaintiff had given them notice to quit which terminated on May 19, the flat was let and new tenants were waiting to come in. The plaintiff's furniture was stacked in the basement, and the rooms cleared out.

The plaintiff denied having given any notice to quit as alleged, and through his solicitors demanded the restoration of his furniture and possession of his rooms, with compensation for the inconvenience caused.

It appeared that in May, 1922, the defendant had issued a summons claiming possession of the plaintiff's rooms and stating that his weekly tenancy had been determined by notice to quit of April 29, 1922. The plaintiff ignored this summons, which was not proceeded with, and he remained in possession of the rooms, paying an increased rent, which was accepted by the defendant for a period of much more

than three months from the expiration of the notice to quit.

By his writ in the action commenced on June 7, 1923, the plaintiff claimed an injunction to restrain the defendant from interfering with the plaintiff in his quiet enjoyment of his rooms or maisonette at 32 Oxford Gardens and from refusing or obstructing his free use of and access to the same; and an inquiry as to damages occasioned through the defendant having forcibly taken possession of the same. On June 29 witnesses on both sides were produced for cross-examination, and as a result of the evidence the Court came to the conclusion that there was no sufficient evidence of the alleged notice to quit by the plaintiff to the defendant, and that the entry on the premises by the defendant was improper.

The plaintiff was therefore entitled to judgment for an injunction in the terms of the notice of motion with nominal damages of forty shillings, on the defendant undertaking to reinstate him. The question of costs was reserved for further argument.

W. S. M. Knight for the plaintiff. This action has not been entitled in the Rent Restrictions Act, 1920, and it does not amount to a "proceeding arising out of" that Act. The plaintiff is still a weekly tenant entitled to bring an action in the High Court against any trespasser, and he is not a statutory tenant coming under the provisions of s. 17, sub-s. 2, of the Rent Restrictions Act, 1920. He should not therefore be deprived of the costs of his successful action. An analogous decision as to what was "a claim arising out of the bankruptcy" occurred in *In re Hawke.* (1)

Hon. S. Henn Collins and *O'Hagan* for the defendant. The plaintiff is a statutory tenant under the Rent Restrictions Act, and but for that Act this claim could not have been entertained. He has ceased to be a tenant under the ordinary law, and his action is a "proceeding" arising under s. 17, sub-s. 2, of the Act. It is clearly a case within the jurisdiction

(1) (1885) 16 Q. B. D. 503.

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of the county court, where this action should have been brought, and there is no power to give the plaintiff High Court costs in this action. Sect. 16, sub-s. 3, is inapplicable. *Shuter* v. *Hersh* (1) shows that the defendant's notice to quit was not waived by receipt of rent.

Knight in reply. If the plaintiff was technically a statutory tenant s. 16, sub-s. 3, of the Act excludes the operation of s. 17, sub-s. 2. The defendant having received rent from the plaintiff for more than three months after the expiration of the notice to quit given by her, the plaintiff reverts to his position as a common law tenant.

EVE J. The point is not wholly free from doubt. It is obvious that proceedings could have been taken in the county court, the amount in question being small and the damages clearly within the county court jurisdiction. That in itself, however, would not be sufficient to deprive the plaintiff of his right to costs, and the question really turns on whether the claim is one arising out of the Act, or the provisions thereof, and therefore a proceeding under the Act. The plaintiff says that he has nothing to do with the Act, that he was in possession as tenant, and could properly bring his action against a trespasser in the High Court. The defendant, on the other hand, says: "Nothing of the sort, you were in possession by virtue of the Act. Twelve months before I had given you proper notice to determine the tenancy. You ignored it and remained in possession, and at the relevant date you were a statutory tenant. If you had been called upon to plead in the old way you would have had to declare that you were a tenant by virtue of the Act, and the action therefore is one involving a claim arising out of, and is a proceeding under, the Act." That argument seems to me to be well founded. It is not an analogous case to that which the plaintiff might have brought against the defendant's son, who was the active person in the invasion. Had that action been brought it would have been immaterial to consider under what title the plaintiff had possession of the premises.

(1) [1922] 1 K. B. 438.

It would have been sufficient for him to have alleged and proved possession.

But as between the plaintiff and his landlady it was necessary to prove a right to possession, and the plaintiff could only do so by showing that he was a statutory tenant by virtue of the Act. Therefore, the proceeding is one arising out of the Act, and the action is under the Act. In these circumstances s. 17, sub-s. 2, applies unless it is excluded by reason of s. 16, sub-s. 3, which provides that the acceptance of rent for a period not exceeding three months from the expiration of the notice is not to prejudice the right to possession, and if any order for possession is made any payment of rent so accepted is to be treated as mesne profits. The question is, Had the notice to quit given in April, 1922, become inoperative by reason of the landlady's accepting rent for a period in excess of three months from the expiration of the notice?

Mr. Knight has argued that the effect of that sub-section is that the acceptance of rent for the three months is not to render the notice inoperative, but if rent is accepted for a longer period than the three months the sub-section does not apply, and such acceptance created a new tenancy. When the matter was first argued a fortnight ago I was impressed with the view that the statutory tenancy was superseded by a new agreement by acceptance of rent after the three months had expired and that the tenant had thereby ceased to be a statutory tenant and had become a weekly tenant, but it is obvious from the case of *Shuter* v. *Hersh* (1) in the Court of Appeal that this view is unsound, and that notice was not waived by receipt of rent after the expiration of the three months. Bankes L.J. says: "He"—that is the learned county court judge—"came to that conclusion, as I understand, because of the construction he placed upon s. 16, sub-s. 3, of the Act—namely, that upon the payment of rent for a period of more than three months after the expiration of the notice to quit a fresh tenancy was created between plaintiff and defendant, and that, therefore, in order to

(1) [1922] 1 K. B. 438, 444.

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terminate that fresh tenancy a fresh notice to quit must have been given, and until that notice had been given the plaintiff was not in a position to demand any new statutory increase of rent. I do not place the same construction that the county court judge did upon sub-s. 3 of s. 16, and I cannot draw the inference of fact from the mere acceptance of rent by the plaintiff between May, 1920, and the date he commenced these proceedings that any fresh tenancy between these parties was created." That disposes of the argument based on s. 16, sub-s. 3, and only leaves s. 17, sub-s. 2. The result is that the plaintiff is not entitled to any costs in the action. If the plaintiff desires it, he can have leave to appeal.

Solicitors: *T. E. Crocker & Son; Syrett & Sons.*

G. M.

P. O. LAWRENCE J.
1923
June 29; *July* 19.

In re SHAKESPEARE MEMORIAL TRUST.

EARL OF LYTTON *v.* ATTORNEY-GENERAL.

[1923. L. 890.]

Charity—Educational—Beneficial to the Community—Shakespeare Memorial National Theatre—Donation invested in purchase of Land—Sale of Land—"Mixed charity"—Annual Subscriptions after Donation—Time for ascertaining Nature of Charity—Consent of Charity Commissioners to Sale—Charitable Trusts Act, 1853 (16 *&* 17 *Vict. c.* 137), *s.* 62.

The Shakespeare Memorial Trust was established to erect and endow a Shakespeare Memorial National Theatre, with the object of performing Shakespeare's plays, reviving English classical drama, and stimulating the art of acting:—

Held, that the trust was a good charitable trust, on the ground either that the objects were for the advancement of education or that they came within the class of purposes beneficial to the community other than by way of the relief of poverty or the advancement of education or religion referred to by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A. C. 531, 583.

At the time when a donation of 70,000*l.* was made to the charity, part of which was applied by the charity in the purchase of a site for the theatre,

no annual subscription had been received, but within only nine days of that time the first annual subscription was received. On the subsequent sale of the site, the question arose whether, in those circumstances, the consent of the Charity Commissioners was required to the sale by the charity :—

Held, that notwithstanding that in the inception of its formation it was contemplated that the charity should be supported by annual subscriptions as well as by income from endowment, and notwithstanding that there was an interval of nine days only between the donation and the first of the annual subscriptions, the charity was not at the time when the donation was received a mixed charity within s. 62 of the Charitable Trusts Act, 1853; and, as it was, therefore, not exempted from the jurisdiction of the Charity Commissioners, their consent to the sale by the charity was required.

In re Child Villiers' Application [1922] 1 Ch. 394 applied.

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Before the year 1908 there were in existence a Shakespeare Memorial Committee and a National Theatre Committee. Each of those bodies had received by way of donation certain sums of money for carrying out the objects for which they were formed, their objects being sufficiently indicated by the names of the respective bodies.

In 1908 it was arranged that a conference should take place between the representatives of each of those two committees with a view to their combining to carry out both the objects in view by means of some common scheme. A conference was held, accordingly, and resulted in an amalgamation of the two bodies, and they became the Shakespeare Memorial Trust. An executive committee was appointed by the united general committee and they drew up a scheme and a constitution. The scheme was to provide a national theatre as a memorial to Shakespeare with the following objects in view: (1.) to keep the plays of Shakespeare in its repertory; (2.) to revive whatever else is vital in English classical drama; (3.) to prevent recent plays of great merit from falling into the oblivion into which the present theatrical system is apt to consign them; (4.) to produce new plays and to further the development of the modern drama; (5.) to produce translations of representative works of foreign drama, ancient and modern; (6.) to stimulate the art of acting through the varied opportunities which it will offer

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to the members of its company. That scheme was sanctioned at a meeting of the general committee held at the Mansion House on March 23, 1909; and at that meeting it was announced that an anonymous donor had contributed 70,000*l.* towards the sum required for the objects of the charity. The fact to which it was intended to allude was that Sir Carl Meyer had promised that he would give 70,000*l.* towards the objects of the scheme. At that date the funds of the charity consisted of certain sums which had been given by way of donation to each of the committees. As regards the Shakespeare Memorial Committee, a Mr. Badger had given 500*l.*, Mr. Eno had given 500*l.*, and there were other donations. Similarly as regards the National Theatre Committee, donations had been received. When the united committee was formed, those funds were amalgamated, and became the funds of the Shakespeare Memorial Trust, and those were the only funds which that body had at the date of the meeting of March 23, 1909.

On May 8, 1909, Sir Carl Meyer, in pursuance of his promise made in March of that year, gave 70,000*l.* to the Shakespeare Memorial Trust.

On May 20, 1909, a deed poll was executed by the trustees thereof whereby they declared that they held the 70,000*l.* donation and any investments representing the same and the income thereof and all other moneys which might thereafter be subscribed in trust for the Shakespeare Memorial Committee.

In 1914, the executive committee purchased for 50,000*l.* out of the general funds in the hands of the trustees a site for the proposed theatre at the corner of Gower Street and Keppel Street, which was in due course conveyed to the trustees; and it was not in dispute that a large part of those general funds consisted of the 70,000*l.* given by Sir Carl Meyer.

Owing to the effects of the war the scheme became impracticable, and on April 18, 1922, an agreement was entered into by the trustees for the sale of the site for 52,000*l.*; and on the purchasers requiring the vendors to

obtain the consent of the Charity Commissioners to the sale, this summons was taken out to have that question determined.

H. F. F. Greenland for the trustees of the Shakespeare Memorial Trust.

Dighton Pollock for the Attorney-General. Before the question whether the land in question is exempt from the jurisdiction of the Charitable Commissioners, by virtue of s. 62 of the Charitable Trusts Act, 1853, there is the preliminary question whether the trust is a good charitable trust. It is submitted that it is. It is charitable either on educational grounds or else as coming within the fourth division referred to by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1) as being for purposes beneficial to the community, other than the relief of poverty or the advancement of education or religion: see also *In re Verrall.* (2)

Gavin T. Simonds for the secretary of the general committee of the Shakespeare Memorial Trust and on behalf of the subscribers, adopted the same argument.

Wilfrid M. Hunt for the executors of Sir Carl Meyer. This is not a charitable trust. Its objects are in reality only the same as those of a theatre for very high-class performances. The fact that a national theatre proposed will not be carried on for profit is not material. To benefit the community is not necessarily a charitable object, it may be only philanthropic.

P. O. LAWRENCE J. Upon the preliminary question, whether the Shakespeare Memorial Trust is a good charitable trust or not, I have come to the conclusion that the contention of the Attorney-General must prevail on one or other of the grounds which he has put forward.

In the first place, I am of opinion that the trust is a charitable trust on educational grounds. The trust, according to my view of the evidence, consists of an educational scheme. The main object of the scheme is not only to raise the tone

(1) [1891] A. C. 531, 583. (2) [1916] 1 Ch. 100.

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of the drama, but also to instruct in the art of producing plays which will benefit the community. The scheme is clearly designed to spread the influence of Shakespeare and to make known more widely the beauty of his works.

In the second place I am of opinion that, if the trust be not one for the advancement of education, it falls under the fourth class of charitable trusts enumerated by Lord Macnaghten in the passage to which Mr. Dighton Pollock has referred in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), as it is a trust for purposes beneficial to the community other than the relief of poverty or the advancement of education or religion. The scheme seems to me to be one which is essentially for the public benefit: it is to produce plays of a high character and to instruct the public in the art of acting.

In the result I hold that this trust is a charitable trust; and I further hold that the objects of the trust have not failed.

The further question, whether the charity was a mixed charity within the meaning of s. 62 of the Charitable Trusts Act, 1853, so as to exempt the donation from the jurisdiction of the Charity Commissioners, was then adjourned for the purpose of enabling further evidence to be adduced as to the payment of annual or periodic subscriptions; and on the further hearing of the summons on July 19, it appeared that at the time when the 70,000*l.* donation was made—namely, on May 8, 1909—no annual subscription had been received, and, further, that the first annual subscription was received on May 17, 1909, that is to say, nine days only after the donation. That subscription was followed by 129 additional annual subscriptions during the remainder of that year. The number of the subscriptions gradually tailed off, until in the year 1922 only twenty-one annual subscriptions were received. It also appeared that the total amount subscribed down to the end of the year 1922, in addition to the 70,000*l.* donation, was nearly 11,000*l.*

(1) [1891] A. C. 531, 583.

H. F. F. Greenland for the trustees of the charity.

Gavin T. Simonds for the secretary of the general committee of the charity and on behalf of the subscribers. The land is exempted from the jurisdiction of the Charity Commissioners by s. 62 of the Charitable Trusts Act, 1853. (1) The donation here was given to a mixed charity within the meaning of the second part of that section. Although no formal appeal may have been put out when Sir Carl Meyer gave his donation, yet his donation and the voluntary subscriptions were all made for the same object and in response to a general desire to erect a memorial to Shakespeare. Here the donation was to a charity which in its inception it was intended should be supported by voluntary subscriptions. It was a mixed charity, therefore, from its inception. The short interval of nine days between the donation and the first of the voluntary subscriptions ought not to be regarded. In the case of

(1) 16 & 17 Vict. c. 137, s. 62: "This Act shall not extend to . . . . and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act . . . ."

Sect. 66: "In the construction of this Act, except where the context or other provisions of the Act may require a different construction . . . . the expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure . . . . and all stocks, funds, monies, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof."

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In re Child Villiers' Application (1), the interval was one of several months.

Dighton Pollock for the Attorney-General. The charity is not a mixed charity, so as to be exempted from the jurisdiction of the Charity Commissioners, and therefore their consent to the sale of the land is necessary. It is necessary to have regard to the moment of time when the donation was made, and in this case there was not at that moment any voluntary subscription: *In re Child Villiers' Application.* (1) In *Attorney-General* v. *Foundling Hospital* (2) subscriptions, however small, were held to be sufficient to constitute a charity a mixed charity; so strictly is the section construed.

July 19. P. O. LAWRENCE J. The Court is now asked to decide whether the consent of the Charity Commissioners is necessary to the sale of certain land belonging to the charity situate at Gower and Keppel Streets in St. Giles, London, which land was purchased out of money, including a sum of 70,000*l.*, held upon the trusts of a deed poll dated May 20, 1909.

On a previous occasion, when the summons first came before the Court, I held that the trust was a good charitable trust and had not failed. The question which has now to be determined is whether the donation of 70,000*l.* is exempted from the jurisdiction of the Charity Commissioners by s. 62 of the Charitable Trusts Act, 1853. [His Lordship then read the latter part of s. 62 of the Charitable Trusts Act, 1853, as the same is set out in the note (3), and continued:] In my judgment, the solution of the question turns entirely upon whether at the date when the 70,000*l.* was given by Sir Carl Meyer the charity was a mixed charity maintained partly by voluntary subscriptions and partly by income arising from endowment.

[His Lordship then stated how the charity was constituted and the other material facts above set out and continued:] In those circumstances it is difficult to appreciate how it can

(1) [1922] 1 Ch. 394. (2) [1914] 2 Ch. 154.
(3) Ante, p. 403.

successfully be contended that before May 17, 1909, the charity was maintained partly by voluntary subscriptions and partly by income arising from endowment, because up to that date no annual subscriptions had been received or even promised. From May 17, 1909, down to the present time it is not disputed that the charity has been a mixed charity, having been maintained partly by voluntary subscriptions and partly by income arising from endowment.

Mr. Gavin Simonds has argued that the donation of 70,000*l.* which Sir Carl Meyer made to the charity was a gift to a charity which from its inception was supported by voluntary subscriptions as well as by income from endowment. In support of that contention, he relied upon the fact that the general committee which was formed, as the result of the conference of the two bodies, from the first contemplated that the charity should be one which should be supported by annual subscriptions as well as by donations and that, directly an appeal was made to the public, annual subscriptions were received. He contended that in this respect the present charity differs from the charity dealt with in the Court of Appeal in *In re Child Villiers' Application.* (1) Now it is true that the executive committee, from the outset, recommended that the charity should be supported not only by donations, but also by annual subscriptions. It is also true that, as soon as the appeal was issued to the public, annual subscriptions were promised and received. It is said that it would be absurd to apply strictly the decision in *In re Child Villiers' Application* (1) to such a case as this, where it was never contemplated that the charity should subsist solely on income arising from endowment. Having regard to the judgments delivered in that case, however, I think my duty is perfectly plain. Applying the ratio decidendi of that case to the facts here, it seems to me immaterial that it was intended that there should be contributions by way of annual subscriptions or that some days after the gift contributions by way of annual subscriptions were received. The sole test, as I understand the decision of the Court of Appeal,

(1) [1922] 1 Ch. 394.

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is whether, at the moment when the gift is made, the charity is partly maintained by voluntary subscriptions or not. Applying that test to the present case, it is quite plain that at the crucial date the charity was not partly maintained by voluntary subscriptions within the meaning of s. 62, because no voluntary subscriptions had at that date been received by the charity. I do not think, after that decision, that it is competent for this Court to hold that, because the charity became a mixed charity in a very short interval after the date when the donation was made, or because it was contemplated, from the first, that the charity should be a mixed charity, this donation is exempt from the jurisdiction of the Charity Commissioners. It appears, moreover, from the report of *In re Child Villiers' Application* (1) that it was contemplated, from the first, that the charity there should be a mixed charity. It is true that in that case the annual subscriptions did not begin to be received until some months after the donation of the land, but the decision did not depend upon the length of the interval between the donation and the payment of the first subscription. The judgments of the members of the Court of Appeal show clearly that it is necessary to look at the financial state of the charity existing at the moment when the gift is made. If at that moment the charity is not a mixed charity, then the donation is subject to the jurisdiction of the Charity Commissioners, and whether at that moment the charity is a mixed charity or not can be judged only by ascertaining whether at that moment the charity is in receipt of annual subscriptions.

For these reasons I am of opinion that the charity was not a mixed charity at the date when the donation of 70,000*l.* was received and that the consent of the Charity Commissioners to the sale of the land in question is necessary.

Solicitors: *Bircham & Co.; Lewis & Lewis; Solicitor to the Treasury.*

(1) [1922] 1 Ch. 394.

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In re CLARKE.

BRACEY *v.* ROYAL NATIONAL LIFEBOAT INSTITUTION.

[1922. C. 2834.]

Will—Gift of Residue to Four Classes of Objects—Charitable and non-charitable indefinite Objects—Power of Distribution in Executors—Non-exclusive Power of Appointment—Invalidity—Equal vesting in Default of Appointment—Gift to indefinite non-charitable Objects invalid.

The testator gave his residuary estate to (*a*) indefinite charitable objects, (*b*) and (*c*) two named charities, and (*d*) such indefinite charitable and non-charitable objects as his executors should think fit; and directed that the residue should be divided amongst (*a*), (*b*), (*c*) and (*d*) in such shares and proportions as his executors should determine:—

Held: (1.) that the whole gift was not void for uncertainty, but that the gift to class (*d*) alone was void;

(2.) that until the executors exercised their power of distribution, the fund vested in the four classes, the objects of the power, in equal shares;

(3.) that the power given to the executors was a non-exclusive power of appointment, and that inasmuch as, if valid, it could by virtue of Lord Selborne's Act be exercised by appointing the whole fund to class (*d*), it was an invalid power, for a power to appoint to charitable and non-charitable indefinite objects was just as invalid as a gift to such objects; and

(4.) that the power being invalid, the fund remained vested in the four classes of objects in equal shares, each of the classes (*a*), (*b*), and (*c*) taking one-fourth, the remaining one-fourth, invalidly given to class (*d*), going to the next of kin.

"Poverty" is a relative term, and the expression "poor people," for the purposes of a legal charity, is not necessarily confined to the destitute poor, but may extend to comprise persons of moderate means.

Trustees of the Mary Clark Home v. *Anderson* [1904] 2 K. B. 645; *In re Gardom* [1914] 1 Ch. 662 applied.

Statement of the principles upon which depends the validity or invalidity of gifts to definite and indefinite charitable and non-charitable objects.

Morice v. *Bishop of Durham* (1804) 9 Ves. 399; 10 Ves. 522 and *In re Macduff* [1896] 2 Ch 451 distinguished and explained.

Salusbury v. *Denton* (1857) 3 K. & J. 529 and *Hoare* v. *Osborne* (1866) L. R. 1 Eq. 585 applied.

ADJOURNED SUMMONS.

The testator disposed of his residuary estate in the following terms: "I give and bequeath all the residue and remainder

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of my estate not otherwise disposed of by this my will to (*a*) such institution society or nursing home or nursing homes or similar institutions as assist or provide for persons of moderate means such as clerks governesses and others who may not be able or eligible to benefit under the National Health Insurance Act Old Age Pensions or other Act of a like character to have either surgical operations performed together with medical treatment or medical treatment alone on payment of some moderate contribution (*b*) the Royal National Lifeboat Institution (*c*) the Lister Institute of Preventive Medicine (*d*) and such other funds charities and institutions as my executors in their absolute discretion shall think fit And I direct that such residue shall be divided amongst the legatees named in the paragraphs (*a*) (*b*) (*c*) and (*d*) lastly hereinbefore contained in such shares and proportions as my trustees shall determine."

This was a summons by the executors to determine (inter alia) whether the residuary estate was validly disposed of by the will or whether the above gifts failed in whole or in part for uncertainty.

Tanner for the plaintiffs.

Sheldon for the Royal National Lifeboat Institution. The words "as my executors shall think fit" relate to both (*a*) and (*d*). The gift to class (*d*) may be bad as including indefinite non-charitable objects: *Morice* v. *Bishop of Durham* (1); but the gifts to (*a*), (*b*) and (*c*) are to definite charitable objects, which the executors cannot exclude and to each of which something must be given, although the executors can apportion the amount. If they fail to do so, the Court will apportion: *Hunter* v. *Attorney-General* (2); and in the present case it will apportion one-fourth to each class. If a power of appointment amongst a class is given to A., and A. does not appoint, the Court will decide who are the members of the class, and will apportion as it thinks the

(1) 9 Ves. 399; 10 Ves. 522. (2) [1899] A. C. 309, 323, 324.

testator intended: *Attorney-General* v. *Doyley* (1); *Salusbury* v. *Denton*. (2)

Farwell K.C. and *Kenneth Wood* for the Lister Institute of Preventive Medicine. The Court will give effect to a general charitable gift. Where the gift is to both a charitable and non-charitable object, the Court will endeavour to ascertain what portion would satisfy the latter object, if it were legal, and will apportion the fund accordingly: *Hoare* v. *Osborne* (3); Jarman on Wills, 6th ed., vol. i., p. 228. A gift to such charities as his executors may select is good: per Lord Haldane in *Houston* v. *Burns*. (4) This is a gift to four different classes (*a*), (*b*), (*c*) and (*d*), and the words "as my executors in their absolute discretion shall think fit" apply only to class (*d*). There is a perfectly definite gift of some portion of the fund to the specific charities named in (*b*) and (*c*), both of which are definite charitable institutions, as to which there is no power of selection; and although the amount which they are to receive is left to the executors, that does not prevent the gift from taking effect, even if the gifts to (*a*) and (*d*) may be invalid. In *Morice* v. *Bishop of Durham* (5) Lord Eldon recognized that in such a gift the charity could take a proportionate part. In a gift "to such charitable and benevolent institutions" as the trustees might select, "charitable" was held to qualify "benevolent," and the gift was good: *Caldwell* v. *Caldwell*. (6)

Alternatively, we submit that the whole of the residuary gift is charitable. If on the true construction of the gift the executors may not travel outside charities, then there is a good general charitable intent. Where the Court can find sufficient evidence in the will of a general charitable purpose then it will give effect to the gift, although it might include non-charitable objects: *In re Douglas*. (7) Class (*a*) is a good charity, for it is for purposes beneficial to the community,

(1) (1735) 7 Ves. 58n.; 4 Vin. Abr. 485.
(2) 3 K. & J. 529.
(3) L. R. 1 Eq. 585.
(4) [1918] A. C. 337, 343.
(5) 10 Ves. 522.
(6) [1921] W. N. 272.
(7) (1887) 35 Ch. D. 472.

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and in class (*d*) the word "charities" is general, and means to combine every kind of charitable object, whether it is a charity or an institution.

Manning K.C. and *Byrne* for the next of kin. The bequest under (*a*) is bad, because the objects are not charitable. Persons of moderate means are not "poor" within the recognized meaning of "charity"; they may be the objects of philanthropy but not of charity: per Rigby L.J. in *In re Macduff.* (1) The bequest under (*d*) is also bad, because the executors in selecting "funds, charities and institutions" might travel right outside a charity altogether.

Lord Davey in *Hunter* v. *Attorney-General* (2) pointed out that there was a long series of cases from *Morice* v. *Bishop of Durham* (3) to *In re Macduff* (1) in which the whole gift failed for uncertainty, because either charitable purposes were so mixed up with other purposes of such a shadowy and indefinite nature that the Court could not execute them, or because the description included purposes which might or might not be charitable and a discretion was vested in the trustees. This case is clearly covered by those observations. When the gift is affected by the vice of uncertainty the Court will not apportion. In *Salusbury* v. *Denton* (4) there was a definite and ascertained class and there was no uncertainty to invalidate the gift. Further, this gift is all one, and the executors might select some non-charitable object coming under (*d*) only, and they could then under the Powers of Appointment Act, 1874, appoint all to that one object, and that being so it is not possible to say that any one object is entitled to anything, or to make any apportionment.

Dighton Pollock for the Attorney-General. The bequest under (*a*) is good. A home for people with moderate means is a good charity: *In re Estlin* (5); *Trustees of the Mary Clark Home* v. *Anderson* (6); *In re Gardom.* (7) I submit

(1) [1896] 2 Ch. 451, 471.
(2) [1899] A. C. 309, 323.
(3) 9 Ves. 399; 10 Ves. 522.
(4) 3 K. & J. 529.
(5) (1903) 89 L. T. 88.
(6) [1904] 2 K. B. 645.
(7) [1914] 1 Ch. 662.

that the bequest under (*d*) is good also, and that the testator has introduced into that and the other gifts a good charitable intent. A gift "for such charities and other public purposes as lawfully might be in the parish of T." was held a good charitable gift in *Dolan* v. *Macdermot.* (1)

W. Hunt for another defendant took no part in the argument on this point.

Cur. adv. vult.

April 23. ROMER J. stated the gift of the testator's residuary estate as above set out, and continued: It is admitted that if all the objects referred to under the headings (*a*), (*b*), (*c*) and (*d*) are charitable objects the residue is validly disposed of. But, while admitting that the Royal National Lifeboat Institution and the Lister Institute of Preventive Medicine are charitable objects, it is contended on the part of the next of kin that the objects referred to under the headings (*a*) and (*d*) are not exclusively charitable. Whether this contention is well founded or not is the first question that I have to determine. It was contended on behalf of the next of kin that the objects designated under heading (*a*) are not charitable, because the persons to be benefited by the institution, society or nursing homes are not poor persons but persons of moderate means, and because such persons can only benefit on payment by themselves of some moderate contribution. But in *Trustees of the Mary Clark Home* v. *Anderson* (2), a home for ladies in reduced circumstances, of which the inmates were to be ladies of fifty years old or upwards possessed or in the actual enjoyment of a fixed yearly income of not less than 25*l.* and not more than 55*l.*, was held to be exempt from landlord's property tax and inhabited house duty as being a "house provided for the reception or relief of poor persons." Channell J. in the course of his judgment, after referring to the case of *Attorney-General* v. *Wilkinson* (3), said: "That seems to lead to the conclusion

(1) (1868) L. R. 3 Ch. 676. (2) [1904] 2 K. B. 645, 655.
(3) (1839) 1 Beav. 370.

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that the expression 'poor person' in a trust for the benefit of poor persons does not mean the very poorest, the absolutely destitute; the word 'poor' is more or less relative." A little further on he added: "I do not know any standard of poverty, nor how I can lay down any rule; the only thing to guide me is this: these ladies go to the institution for the sole reason that they are poor, and the institution is absolutely charitable." In *In re Gardom* (1) it was held that a gift for the maintenance of a temporary house of residence for ladies of limited means was a good charitable gift. Eve J. in giving judgment said: "It is true that ladies of limited means are not destitute, and that the expression 'limited means' may vary in its signification according to the standard by which the means are measured, but these arguments provoke the rejoinder that there are degrees of poverty less acute than abject poverty or destitution, but poverty nevertheless, and further that in this case the limitation of means contemplated is presumably a limitation such as will necessitate some contribution from the bounty of the testatrix before the recipient would be able to defray the expense of a temporary sojourn in the home. In other words the objects to be benefited by the bequest are ladies too poor to provide themselves with a temporary home without outside assistance. I think it is a good charitable trust and am fortified in this view by some observations of Channell J. in the case of *Trustees of the Mary Clark Home* v. *Anderson* (2)"; and then after citing the passage from the judgment of Channell J. to which I have just referred he added: "I think those words apply exactly to the section of the public and to the institution which the testatrix here intended to benefit and to subsidize."

In the present case I think that the words of Channell J. and the words of Eve J. which I have quoted apply exactly to the section of the public and to the institutions which the testator intended to benefit and to subsidize. The "moderate means" to which he refers are presumably means so

(1) [1914] 1 Ch. 662, 668. (2) [1904] 2 K. B. 645, 655,

moderate as to necessitate some contribution from the bounty of the testator before the recipient would be able to procure the surgical operation or medical treatment of which the recipient might stand in need. In *In re Estlin* (1) it was moreover held by Kekewich J. that a bequest for the purpose of establishing a home of rest for lady teachers was none the less charitable because each lady was required to contribute 10*s.* a week for board and lodging. I therefore hold that the objects under heading (*a*) are charitable objects. On the other hand I am of opinion that the objects under heading (*d*) are not exclusively charitable. I can find nothing in the will to prevent the executors from selecting under this heading non-charitable funds and institutions. In a later part of his will the testator no doubt refers to certain charitable institutions as "funds charities or institutions," but I cannot infer from this or any other words of the will that the testator contemplated this expression as one that excluded non-charitable objects.

If I am right so far the testator has therefore given his residue to: (*a*) Indefinite charitable objects; (*b*) A definite charitable object; (*c*) Another definite charitable object; (*d*) Such indefinite charitable and non-charitable objects as his executors think fit, and has directed that the residue shall be divided amongst these legatees in such shares and proportions as his trustees (by which presumably he meant his executors) should determine. It is contended on behalf of the next of kin that such a disposition of the residue fails for uncertainty in accordance with the principle enunciated and applied in *Morice* v. *Bishop of Durham* (2) and many other similar cases. That principle is stated by Lord Davey in *Hunter* v. *Attorney-General* (3) in these words: "There is a long series of cases extending from *Morice* v. *Bishop of Durham* (2), decided by Sir William Grant and Lord Eldon, to *In re Macduff* (4), decided by the Court of Appeal in 1896,

(1) 89 L. T. 88.
(2) 9 Ves. 399.
(3) [1899] A. C. 309, 323.
(4) [1896] 2 Ch. 451.

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and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as 'charitable or benevolent,' or 'charitable or philanthropic,' or 'charitable or pious' purposes), or where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility'), and a discretion is vested in the trustees, the whole gift fails for uncertainty. In *Vezey* v. *Jamson* (1) the trust was to dispose of the residue in such charitable or public purposes as the laws of the land would admit, or to any persons as the trustees in their discretion should think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit. Sir John Leach said: 'The testator has not fixed upon any part of this property a trust for a charitable use; I cannot therefore devote any part of it to charity. . . . . The necessary consequence is, that the purposes of the trust being so general and undefined that they cannot be executed by this Court, they must fail altogether, and the next of kin become entitled to the property.'"

But as I understand this principle it only applies to cases where, upon the words of the will, the executors in the exercise of their discretion could apply the whole fund to non-charitable indefinite objects. In such cases the testator has not, in the words of Sir John Leach, "fixed upon any part of his property a trust for a charitable use." It is of course obvious that if a testator gives a definite proportion of his property to such charitable objects as his executors may select, and the rest of his property to such non-charitable indefinite objects as his executors may select, the gift of the definite proportion would be a valid charitable gift and it would only be the gift of the rest of his property that would fail. But suppose that instead of himself fixing the definite proportion to be applied for charitable objects the testator should give to charity a part of his property without saying what

(1) (1822) 1 S. & S. 69.

part and the rest to non-charitable indefinite objects. In such a case the executors could not, I apprehend, devote the whole of the property to the non-charitable objects, and if once the Court can ascertain what is the part to be devoted to charity, I see no reason why the gift of such part should be invalid.

Now, in *Salusbury* v. *Denton* (1) there was a bequest of a fund to be at the disposal of the testator's widow, by her will, therewith to apply a part to the foundation of a charity school, or such other charitable endowment for the benefit of certain poor as she might prefer; and the remainder to be at her disposal among the testator's relatives as she might direct. It was held that, although the fund was to be applied as to a part, without saying what part, for one set of objects and as to the remainder for another, and the widow died without exercising her power of determining the proportions in which each were to take, the bequest was not void for uncertainty, but the Court would divide the fund in equal moieties, and give one of such moieties to charitable purposes and the other to the testator's relatives. In giving judgment Wood V.-C. clearly recognizes the distinction between such a case and one where the trustee could give the whole of the fund to non-charitable objects. Referring to a case of *Down* v. *Worrall* (2) he says: "In *Down* v. *Worrall* (2) the testator left part of his residuary personal estate to his trustees to settle it either to or for charitable or pious purposes, at their discretion, or otherwise for the separate benefit of his sister and all or any of her children, in such manner as his trustees should think fit. And there it was held, that a sum which remained at the decease of the surviving trustee, and which had not been applied either to charitable purposes or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next of kin. Now, whether that case can or cannot be reconciled with all the others on this subject, it is very clearly distinguished from the present: for it is one thing to direct a trustee to

(1) 3 K. & J. 529, 538. (2) (1833) 1 My. & K. 561.

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give *a part* of a fund to one set of objects, *and the remainder* to another, and it is a distinct thing to direct him to give 'either' to one set of objects '*or*' to another. *Down* v. *Worrall* (1) was a case of the latter description. There the trustees could give all to either of the objects. This is a case of the former description. Here the trustee was bound to give a part to each. I am therefore of opinion, that, even if the case of *Down* v. *Worrall* (1) can be reconciled with the other authorities on this subject, it cannot affect my decision in the case before me. Here there is a plain direction to the widow to give a part to the charitable purposes referred to in the will as she may think fit, and the remainder among the testator's relatives as she may direct. And the widow having died without exercising that direction, the moiety in question must be divided equally."

If therefore in any case the executors cannot refuse to allocate a part of the fund to charitable purposes they must either fix the part to be given to those purposes, or, if they do not exercise their discretion, the Court would itself divide the fund between the charitable and the non-charitable objects. The Court is therefore able either through the exercise by the executor of his discretion, or by itself dividing the fund, to ascertain the proportion of the fund to be devoted to charitable purposes, and, when once that has been done, it appears to me that there is no difficulty in the Court giving effect to the trusts affecting the parts so allocated to charitable objects. It is true that in *Hunter* v. *Attorney-General* (2) Lord Davey, in referring to the case of *Salusbury* v. *Denton* (3) and *Attorney-General* v. *Doyley* (4), referred to them as authorities for the proposition that where trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable the trust does not fail. I think, however, that Lord Davey was merely contrasting cases where the trustees have an option to apply the whole fund to charitable or non-charitable indefinite

(1) 1 My. & K. 561.
(2) [1899] A. C. 309.
(3) 3 K. & J. 529.
(4) (1735) 7 Ves. 58n.

objects as they think fit and cases where they have a discretion to apply the whole fund to charitable or definite and ascertainable non-charitable objects, and that he did not intend to intimate that the distinction drawn by Wood V.-C. in the passage to which I have referred was only applicable to cases where the non-charitable objects were definite and ascertainable.

The principle of the matter appears to me to be this. Where a fund is directed to be held upon trust for charitable and non-charitable indefinite purposes indiscriminately the trust fails by reason of the uncertainty as to the non-charitable objects of the trust and the consequent inability of the Court to control its administration. In *Morice* v. *Bishop of Durham* (1), where a fund was given upon trust for such objects of benevolence and liberality as the Bishop of Durham should approve of, Sir William Grant in holding the gift to be invalid expressed himself as follows: "That it is a trust, unless it be of a charitable nature, too indefinite to be executed by this Court, has not been, and cannot be, denied. There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrolable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those, to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody, in whose favour the Court can decree performance. But it is now settled, upon authority, which it is too late to controvert, that, where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object: but the particular mode of application will be directed by the King in some cases, in others by this Court." Where on the other hand a fund is to be held upon trust for charitable and for non-charitable definite

(1) 9 Ves. 399, 404.

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purposes there is no uncertainty as to the non-charitable objects of the trust and the trust is a valid one. In both these cases the question that has to be considered is whether the objects of the trust can or cannot be ascertained by the Court. But in a case where a part of a fund is given for charitable purposes and the other part is given for non-charitable purposes, the first question that has to be considered is whether the Court can ascertain what are the two parts. In such a case the Court finds no difficulty where the non-charitable purposes are definite, as appears from *Salusbury* v. *Denton* (1), and I cannot see that there is any greater difficulty where the non-charitable purposes are indefinite. It is true, of course, that where such purposes are indefinite it is impossible to say how much is required for those purposes since the purposes cannot be ascertained. But the same impossibility occurred in the case of *Hoare* v. *Osborne* (2), where a fund was given upon trust out of the income thereof to keep in repair a monument in a church, a vault in the churchyard and an ornamental window in the church. It was held that the trust for the repair of the vault was not charitable and was void, but that the trusts for the repair of the monument and window were valid as being charitable. The question then arose as to how the fund should be divided, and the Court directed the fund to be equally divided into three parts on the ground of the impracticability from the nature of the gift of ascertaining the proportions that would be required for the three objects respectively. If the difficulty of ascertaining how much is required for any particular object does not deter the Court from dividing the fund, it appears to me to be immaterial whether that object is a definite or an indefinite one. It is moreover to be observed that, though for the purpose of the rule as to uncertainty of the objects of a trust, the Court treats charitable indefinite objects as being certain, owing to the favour always extended by the Court to charities, the impossibility of ascertaining how much of a fund is required for indefinite objects is just as great

(1) 3 K. & J. 529. (2) L. R. 1 Eq. 585.

a practical difficulty where the objects are charitable as where they are non-charitable. And yet, both in *Salusbury* v. *Denton* (1) and *Attorney-General* v. *Doyley* (2) the Court was able to make a division of the fund between charitable indefinite objects and definite non-charitable objects.

It only remains to apply these principles to the present case.

Now the effect of the residuary gift appears to me to be that the testator has given his residue to the four objects or sets of objects (*a*), (*b*), (*c*) and (*d*) with power to his executors to determine in what shares and proportions the residue is to be divided between the four. There is no express gift in default of the executors so determining, but the rule of the Court in such a case has been laid down as follows: "If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment": see *Lambert* v. *Thwaites*. (3)

Now it is said on behalf of the next of kin that the executors in this case have a power of appointment amongst the four objects or sets of objects. I think that they are right in this contention. Although it is in terms a power of distribution and not of selection, it is what used to be called a "non-exclusive" power of appointment. The next of kin then contend that, having regard to Lord Selborne's Act (37 & 38 Vict. c. 37) the executors can, in exercise of such power, appoint the whole fund to the set of objects (*d*). Again, I think that they are right, assuming that such power is a valid one. But if the power be one that enables the executors to appoint the whole fund to those objects such a power must be invalid on the principles already referred to. For a power to appoint to charitable and non-charitable indefinite objects

(1) 3 K. & J. 529. (2) 7 Ves. 58n.
(3) (1866) L. R. 2 Eq. 151, 155.

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is just as invalid as a direct gift to such objects. There is therefore a gift to the four objects or sets of objects with a super-added power of appointment that I hold to be invalid. The property accordingly remains vested in all the four without the executors having any power to divest it. I therefore arrive at the conclusion that each one of the four objects or sets of objects takes a share in the residue, and in accordance with the principle that equality is equity (of which *Salusbury* v. *Denton* (1) is an example) they take it in equal shares. The result is that one-fourth of the residue is held upon trust for the charitable objects specified in heading (*a*), one-fourth each for the Royal National Lifeboat Institution and the Lister Institute of Preventive Medicine and the remaining one-fourth in trust for the persons entitled to the testator's estate as upon an intestacy.

Solicitors for plaintiffs and next of kin : *Hiscott, Troughton & Grubbe.*

Solicitors for defendants : *Clayton, Sons & Fargus ; E. S. P. Haynes ; Treasury Solicitor ; Pennington & Son.*

(1) 3 K. & J. 529.

R. M.

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C. A. 1923 April 18, 19; May 17.

[1920. M. 1039.]

Trading with the Enemy—Enemy Firm—Order of Board of Trade to wind up Business—Controller—Action by, in Name of Firm against British Partner to recover Assets of Firm collected by him—Addition of Controller as Co-plaintiff in his own Name—Action, whether maintainable—Trading with the Enemy Amendment Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-ss.* 1 *and* 2—*Trading with the Enemy* (*Amendment*) *Act*, 1918 (8 & 9 *Geo.* 5, *c.* 31), *s.* 3, *sub-s.* 3.

At the outbreak of the war, F., a British subject, resident in this country, and three other persons, German subjects, resident in Germany, were carrying on business under the style or firm of M. & Co., in London, F. being the managing partner. The outbreak of the war dissolved the partnership. In October, 1914, when the moratorium had expired, or was about to expire, F. applied for and obtained the sanction of the Home Office to his collecting the assets of the firm and discharging its liabilities. This he proceeded to do, and at the date of the order of the Board of Trade next mentioned, he had got in a large sum of money representing assets of the business, including two sums of 15,000*l.* and 12,500*l.*, cash furnished by the German partners, and had discharged all or nearly all the liabilities of the firm. On November 23, 1918, the Board of Trade made an order under s. 3, sub-s. 3, of the Trading with the Enemy Amendment Act, 1918, that the assets of the business be realized and distributed, and B. was thereby appointed controller, to control and supervise the carrying out of the order and to conduct the realization and distribution of the assets of the business. Amongst other powers conferred on him was a power to get in and collect all moneys owing to or held for or on behalf or account of the business or the proprietor or proprietors thereof.

On May 3, 1920, the controller commenced the present action in the name of M. & Co. as plaintiffs claiming (1.) 4087*l.* 2*s.* 11*d.*, made up of 893*l.* 12*s.* 6*d.*, representing moneys drawn between January 1, 1914, and the outbreak of war in advance and on account of profits under a power conferred by the articles of partnership, and 3193*l.* 10*s.* 5*d.*, alleged to be the balance in his hands, resulting from transactions since the outbreak of the war; (2.) a cash balance of 427*l.* 11*s.* 7*d.* transferred by him from the firm's account to that of himself on the conclusion of the winding up conducted by him; and (3.) an account and payment of moneys received by F. since the outbreak of war from five rubber companies for rent of offices in the firm's premises and secretarial services. On July 20, 1920, the name of the controller as co-plaintiff was added by amendment. On October 2, 1920, F. died, and subsequently the usual order was obtained for carrying on the proceedings against E., his executor. Eve J. gave judgment for the plaintiffs for the sums and the account claimed. On appeal:—

Held, that according to the settled principles of the law of partnership an action could not be brought in the firm name against a partner

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in the firm, inasmuch as, that name being merely a collective description of all the partners, the partner against whom it was brought would be both plaintiff and defendant.

Held, further, that that objection was not cured by the addition of the controller's name, inasmuch as the controller had no independent right of action, but merely represented the proprietors of the business of which he was controller—namely, the partners.

Held, also, that money got in by one of the partners in a firm could only be recovered in an action by the other partners for an account of the dealings and transactions of the partners, in which it would be open to the defendant to show that the money alleged to be in his hands belonged wholly or partially to himself, or even that a larger sum was due to him.

Held, therefore, that the present action was not maintainable and must be dismissed.

Decision of Eve J. reversed.

APPEAL from the decision of Eve J.

The action was brought by the plaintiff firm, Arnold Otto Meyer & Co., against the defendant, Augustus George Faber, claiming by their writ: (1.) a declaration that a sum of 4087*l.* 2*s.* 11*d.* was due and owing from the defendant to the plaintiff firm; (2.) payment of that sum by the defendant to Geoffrey Bostock as the controller of the plaintiff firm appointed pursuant to the Trading with Enemy Acts, 1914 to 1916; and (3.) if necessary, an account. On July 29, 1920, the writ was amended by adding the controller as co-plaintiff. On October 2, 1920, the defendant Faber died, and the action was by order directed to be carried on by the plaintiffs against the defendant, Robert William Elder, as his legal personal representative.

The following statement of facts is taken from the written judgment of Younger L.J.:—

"The original defendant, Augustus George Faber, died on October 2, 1920, and the appellant is the executor appointed by his will. It will be convenient to refer to the one as the defendant and to the other as the new defendant.

"Under articles of partnership of August 21, 1911, the defendant became a partner with three German nationals, Edward Lorenz-Meyer, Adolf Laape and Franz Heinrich Witthoefft, in the business of importers and exporters chiefly of Eastern goods at London House, Crutched Friars, in the

City. Their firm name was Arnold Otto Meyer & Co. Their business was in close association with the private company of Behn Meyer & Co., Ltd., of Singapore, and with the firm of Arnold Otto Meyer of Hamburg. The personnel of the three concerns had many elements in common. For instance, the three partners of the defendant in the London firm—described in the articles as the senior partners—constituted with two other German nationals the Hamburg firm. The defendant however was a partner only in the English house. He was a British subject. By the articles of partnership of the London firm the defendant was appointed managing partner for a term of three years from January 1, 1912: each partner was entitled to an equal share of the profits of the business; the defendant was authorized to draw from the firm on account of his share in current profits sums not exceeding 1000*l.* annually, to be repaid at the end of the year to the necessary extent if his share of current profits did not, when ascertained, so far extend; the defendant was entitled also to 2 per cent. of the 22½ per cent. management commission which the senior partners received from the Singapore House. The senior partners were entitled but not obliged to take part in the London management and any question arising out of or relating to the construction of the articles was to be decided in accordance with English law.

"Associated though it was with these other businesses the only business carried on by the firm was the London business, the only assets and liabilities of the partners as such were the assets and liabilities of that business. The affairs nevertheless were largely controlled by the Hamburg House, two of the senior partners—possibly all three—were resident there and some of the books of the London firm, more particularly the book containing the final statement of the partners' accounts with the firm were, it appears, kept and closed at Hamburg. The account of the defendant, as adjusted on December 31, 1913, was clear. By August 4, 1914, he had drawn on account of his share of profits for the then current year a net sum of 893*l.* 12*s.* 6*d.* In consequence of the outbreak of war on that day the partnership between the defendant

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and his German co-partners, all or some of them resident in Germany, was of course at once dissolved, and so it has happened that no balance sheet or profit and loss account either for the year ending December 31, 1914, or for any period subsequent to December 31, 1913, has since been struck. There has accordingly never arisen, at all events under the articles of partnership, any obligation on the part of the defendant to return this sum of 893*l.* 12*s.* 6*d.* It is however included in the sum of 4087*l.* 2*s.* 11*d.*, which by the order under appeal the new defendant has been directed to pay to the plaintiffs. It will be a matter for separate consideration whether on any view of this case that specific sum was one of which repayment could properly be directed.

"At its dissolution the firm was heavily indebted in respect of outstanding commitments. It was at the same time possessed of outstanding assets and credits of large amount, not however in the then world crisis readily realisable. With the leave of the Home Office the defendant, in order to meet pressing liabilities and maintain the firm's credit, was enabled to obtain 27,500*l.* from his German partners through a representative sent twice to Holland for the purpose, and ultimately on November 3, 1914, he was authorised by the Home Secretary to receive on behalf of his firm the outstanding debts and assets and to discharge therewith the liabilities of the partnership—in other words, to liquidate its affairs. This he proceeded to do, with the result that between August 1, 1914, and August 25, 1916, when, as the learned judge puts it, he closed down, the defendant had collected no less than 195,371*l.* 17*s.* 6*d.* and he had disbursed 194,909*l.* 19*s.* 9*d.* I pause here to say that while these disbursements include sums paid by the defendant to or for his own account—sums which are included in the amount which the learned judge has now ordered the new defendant to pay—they comprise no allowance or remuneration to the defendant for the work or expenses of collection, which must have been very considerable.

"On June 26, 1918, the plaintiff, Mr. Bostock, was appointed by the Board of Trade to inspect the books and documents

of Arnold Otto Meyer & Co. in accordance with the provisions of s. 3 of the Trading with the Enemy Amendment Act, 1916, and by a further order dated November 23, 1918, the Board of Trade, under and in pursuance of s. 3, sub-s. 3, of the Trading with the Enemy Amendment Act, 1918, ordered that the assets of that business should be realised and distributed, and they appointed Mr. Bostock controller, to control and supervise the carrying out of the order and to conduct the realisation and distribution thereby directed. The controller proceeded with his duties, and finding upon an examination of the books and accounts of the business that the defendant had as he alleged retained (1.) The sum of 893*l.* 12*s.* 6*d.* above referred to; (2.) The sum of 3193*l.* 10*s.* 5*d.* paid away by the defendant since the dissolution of the partnership to or for his own account, he on May 3, 1920, commenced this action against the defendant in the name of the firm as plaintiffs, claiming the aggregate of these two sums, i.e. the sum of 4087*l.* 2*s.* 11*d.* as money then due and owing by the defendant to the firm. By amendment on July 20, 1920, Mr. Bostock was added as co-plaintiff, and in the statement of claim as reamended further claims were included in respect of office furniture valued at 230*l.* 16*s.* 8*d.* and a sum of 427*l.* 11*s.* 7*d.* in cash alleged to have been retained by the defendant. The defendant was also by the statement of claim sought to be made accountable for rents alleged to have been received by him in return for accommodation provided in the offices of the firm for certain rubber companies in which the firm was interested. Such were the claims made in the action.

"The defendant, as I have said, died on October 2, 1920, and by his will he appointed the new defendant Mr. Elder to be his sole executor. Mr. Elder duly proved the will on December 4, 1920, and by an order subsequently made the action was directed to be carried on by the plaintiffs against him as legal personal representative of the defendant."

Eve J. gave judgment for the plaintiffs for the sums claimed.

The defendant appealed. The appeal was heard on April 18 and 19, 1923.

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Clayton K.C. and *Heckscher* for the appellant. On behalf of the appellant it is submitted: (1.) The action was wrongly brought against the defendant Faber. An action cannot be properly brought in the firm name against a partner in the firm: Lindley on Partnership, 8th ed., pp. 136, 143. (2.) The controller himself has no separate right of action. (3.) There is no right of action by the firm against one of the partners for moneys got in by him until a partnership account has been taken. The appellant here has a cross-claim against the moneys got in by him.

Further it is submitted that the action is not authorized by the provisions of the Trading with the Enemy Acts. The controller is in a position analogous to that of a receiver. There is no debt due to him for which he can sue in his own name: *In re Sacker* (1); *Rodriguez* v. *Speyer Brothers.* (2) Apart from the Rules of the Supreme Court, which only regulate procedure and do not alter the rights which the partners have one against the other, there is no power to sue in the name of a firm.

Under sub-s. 2 of s.1 of the Trading with the Enemy Amendment Act, 1916, the powers conferred upon a controller are those of a liquidation in a voluntary winding up of a company. The business to be wound up is not a separate legal entity in the sense of being a "persona," but is only a separate entity of property. The controller takes what he finds of the assets in the business at the time of his appointment, and his rights are confined to those assets. In *In re W. Hagelberg Aktien-Gesellschaft* (3) it was held that the creditors referred to in sub-s. 3 of s. 1 of the Act of 1916 were the creditors of the business as mentioned in sub-s. 4 and not the creditors as mentioned in sub-s. 7.

[LORD STERNDALE M.R. The only value of that case is that you can have creditors of a business, which you could not have at common law.]

The Trading with the Enemy Acts do not make a business a person in the sense that it can sue or be sued as such.

(1) (1888) 22 Q. B. D. 179, 183. (2) [1919] A. C. 59, 112.
(3) [1916] 2 Ch. 503.

In *In re Kastner & Co.* (1) it was held that the powers of the controller enabled him to deal with the whole of the assets of a business notwithstanding a charge given to debenture holders over such assets. "Assets of the business" in sub-s. 3 of s. 1 of the Act of 1916 do not however in the case of a company include uncalled capital: *In re Th. Goldschmidt, Ld.* (2), nor the partners' capital in the case of a firm, except so far as it is represented by tangible assets. Capital, legally speaking, is the antithesis of assets. It is what is owed by the firm to the partners, which may or may not be represented by actual assets.

[LORD STERNDALE M.R. *Goldschmidt's Case* (2) seems to carry the matter a step further than *Hagelberg's Case.* (3)]

In any event the 893*l.* 12*s.* 6*d.* drawn by the defendant Faber before the war on account of profits cannot be assets of the business taken over by the controller. It is also submitted that if the claim in the action is for a debt the action is prohibited by the Treaty of Peace Order, 1919.

Gover K.C. and *H. B. Vaisey* for the respondents. As to the right contended for by the appellant of the defendant Faber to have an account taken of what is due to him. After 1916 Faber kept no books of the business and never at any time since the beginning of the war was carrying on the business of the firm, except as receiver. The firm was dissolved on the outbreak of the war and after that time he was merely getting in the assets.

It is contended that this is an action by the German partners against the English partners, but it is submitted it is not such an action but is a claim by the controller.

[YOUNGER L.J. If you rely on the use of the firm name you have the case of a partner suing himself.]

Under the Act of 1916 the controller can sue in the name of the firm: s. 1, sub-ss. 1 and 2.

[YOUNGER L.J. The question is whether when he does so he can make a partner a defendant.]

The order appointing Bostock controller was made "subject

(1) [1917] 1 Ch. 390. (2) [1917] 2 Ch. 194.
(3) [1916] 2 Ch. 503.

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to such special directions as the Board of Trade may from time to time give." One of the matters incidental to the realization of the assets would be an action to recover them. The Board of Trade have given the respondent Bostock instructions to sue for this purpose. Not only did he obtain their authority under s. 3 of the Act of 1918 to bring an action but authority to bring this particular action. It is contended that the action might be good if the respondents were suing an outsider but that they are here suing a partner. The answer to that is that the order made by Eve J. leaves the rights of the partners inter se unaffected.

[YOUNGER L.J. But the Acts do not create a new liability against a partner.]

The respondents are not suing the appellant for a debt. They are not suing as a firm a member of the firm. The controller is suing as a statutory official not for what belongs to the appel lant but for what forms part of the assets of the business. The controller is a constructive trustee of the assets got in.

In a case of this kind the controller can recover a debt due to a company or firm notwithstanding the existence of a right of set-off. He can get in assets of a company as against the debenture holders. His position is paramount even to the interests of the owners. In *In re Kastner & Co.* (1) it was held that the controller was entitled to deal with the whole of the assets of the business notwithstanding the debenture holders' charge and the appointment of a receiver. The provisions as to a company have to be applied to the case of a firm with the necessary modifications. The Board of Trade can under the Act of 1916 give the controller power to sue in the firm's name: *Continho Caro & Co.* v. *Vermont & Co.* (2) In *In re Vulcaan Coal Co.* (3) it was held that a controller appointed by the Board of Trade to wind up the business of an enemy firm did not represent the firm. His duties were to get in the assets and discharge the liabilities of the business. His position is quite different from that of a liquidator: see also *Dresdner Bank* (*London Agency*) v. *Russo-Asiatic Bank.* (4)

(1) [1917] 1 Ch. 390.
(2) [1917] 2 K. B 587.
(3) [1922] 2 Ch. 60.
(4) [1923] 1 Ch. 209.

If the position of the controller were no greater than that of the firm itself the objection that the firm was suing one of themselves might be a good one.

[YOUNGER L.J. That objection could have been got over by the controller obtaining the permission of the Board of Trade to sue in his own name.]

That was the intention of the Board of Trade. When the respondents amended their writ they did so with the knowledge of the Board of Trade. The Board of Trade gave the controller a general authority to take proceedings to recover the assets of the business. It is submitted that the action is brought in the right form by a statutory official to recover the assets of the business.

Clayton K.C. in reply. *In re Vulcaan Coal Co.* (1) does not support the proposition for which it was cited. The business is not a separate "persona" but a separate bundle of assets and liabilities.

Continho Caro & Co. v. *Vermont & Co.* (2) differed in several respects from the present case. The action there was against third parties. The only point taken was that as an alien enemy could not sue, the Board of Trade could not give the controller the power to sue in the name of an alien enemy. The case is no authority for bringing an action in a form in which it could not be brought at law.

In *Dresdner Bank* (*London Agency*) v. *Russo-Asiatic Bank* (3) the permission given was to bring an action in the name of the bank, and it was held that the insertion in brackets of the words "London Agency" in the name of the plaintiff company did not make the action misleading.

Cur. adv. vult.

May 17. The following judgments were delivered:—

LORD STERNDALE M.R. The question in this appeal arises upon a state of facts which I think, for the purposes of this judgment, I may take from the judgment of Eve J. I do

(1) [1922] 2 Ch. 60. (2) [1917] 2 K. B. 587.
(3) [1923] 1 Ch. 209.

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not, by saying that, mean to say that every particular minute statement of those facts may be accurate. If I remember rightly the accuracy of one or two statements, not important ones, was challenged; but for all practical purposes the statement by Eve J. was sufficient. The statement is this: "Under an agreement dated in August, 1911, a partnership had been constituted between three German subjects and the late Mr. Faber, who was a British subject, and by that agreement Mr. Faber had been appointed managing director of the firm of Arnold Otto Meyer & Co. for the term of three years from January 1, 1912. He was appointed really to manage the London business, and he was entitled to a remuneration which was calculated on a share of the profits, in anticipation of which he was to draw at the rate of 1000*l.* a year. That agreement was subsisting on the outbreak of war, on August 4, 1914, but by the declaration of war it was in fact determined, and thereupon Mr. Faber continued the business for the purpose of liquidating its affairs." He did that with the sanction of the Board of Trade. "He collected very large sums of money, approaching I think some 200,000*l.*, including moneys which, with the full approval of the Board of Trade and the English authorities, he received from his partners in Hamburg, and he applied those moneys in liquidating a large number of the liabilities of the firm. This process, the process of what I will call 'liquidation' by Mr. Faber, went on from the date of the outbreak of war until August 25, 1916, and on that date he—if I may use the expression—'shut down' this business; at that time it appeared that, so far as he was concerned, he had received assets of the business, at one time or another, in excess of his disbursements on account of the business, to the extent of 4087*l.* 2*s.* 11*d.*, and that was made up in this way: There was at the beginning of the period an indebtedness by him to the business of 893*l.*—I will leave out the shillings and pence. During the period between the dissolution of the partnership and the final closing of the business he had applied, for his own purposes, moneys belonging to the business passing through the bank, of 2634*l.*, and out of petty cash sums amounting to 97*l.*"

(" applied for his own purposes " does not mean in any way improperly) " and finally when he did close down the business he transferred to his own account a sum of 462*l.* or thereabouts which was standing to the credit of the business at their bankers, and those sums added together made up a sum of 4087*l.* 2*s.* 11*d.*, representing assets of the business in the hands of Mr. Faber. The business was also possessed of some furniture; this furniture was retained by Mr. Faber and no credit was given by him to the business for the amount at which he valued it." Mr. Faber, or the present defendant his executor, agreed that that furniture should be paid for. I am not sure that it does not really come under the same considerations as the money claims, but it does not arise, because he has agreed to give it up. As I say, that must not be taken to be necessarily quite an accurate statement of all the figures and everything, but it is quite sufficient broadly to show the circumstances in which this question arises. After that Mr. Bostock was appointed to inspect the books, and eventually he was appointed controller under sub-ss. 1 and 2 of s. 1 of the Trading with the Enemy Amendment Act, 1916, coupled with s. 3, sub-s. 3, of the Act of 1918, which applies the previous provisions to a business which had ceased to exist, which this was. Sect. 1 of the Trading with the Enemy Amendment Act, 1916, is in these terms: " (1.) Where it appears to the Board of Trade that the business carried on in the United Kingdom by any person, firm, or company is, by reason of the enemy nationality or enemy association of that person, firm, or company, or of the members of that firm or company or any of them, or otherwise, carried on wholly or mainly for the benefit of or under the control of enemy subjects, the Board of Trade shall, unless for any special reason it appears to them inexpedient to do so, make an order either—(*a*) prohibiting the person, firm, or company from carrying on the business, except for the purposes and subject to the conditions, if any, specified in the order; or (*b*) requiring the business to be wound up." It will be noticed that in that section there is no mention of the appointment of a controller, and that section contemplates that there may

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be a winding up without a controller being appointed at all. Then sub-s. 2 gives the power to appoint a controller, and that is in these terms: "Where the Board of Trade make any such order"—that is the one mentioned in the sub-section I have just read—"they may at the same time or at any time subsequently appoint a controller to control and supervise the carrying out of the order, and, if the case requires, to conduct the winding up of the business, and in any case where it appears expedient to the Board of Trade, the Board may, as occasion requires, confer on the controller such powers as are exercisable by a liquidator in a voluntary winding up of a company"—including certain specific powers—"or those powers subject to such modifications, restrictions or extensions as the Board think necessary or convenient for the purpose of giving full effect to the order." Then, as I say, by the Act of 1918 those provisions are applied to a business which has ceased to be carried on. Now the controller was appointed under the Act of 1918. The order of the Board of Trade recites that Arnold Otto Meyer & Co. carried on the business of merchants and agents at London House, Crutched Friars, London, E.C., but had now ceased to carry on such business; and that: "It appears to the Board of Trade that the said business whilst carried on was carried on wholly or mainly for the benefit of or under the control of enemy subjects or of persons who subsequently became enemy subjects"; it then proceeds in the operative part: "Now therefore the Board of Trade in exercise of the powers conferred on them by s. 3, sub-s. 3, of the Trading with the Enemy Amendment Act 1918 and of all other powers them hereunto enabling do hereby order that the assets of the said business be realised and distributed: And the Board of Trade in exercise of the powers conferred on them by the said Act and of all other powers them hereunto enabling do hereby appoint Mr. Geoffrey Bostock, of 21, Ironmonger Lane, London, E.C.2, chartered accountant, as controller to control and supervise the carrying out of the above order and to conduct the realisation and distribution of the assets of the said business: And do hereby confer on the said controller subject to such

special directions as the Board of Trade may from time to time give the following powers, namely: (1.) To get in and collect all moneys owing to or held for or on behalf or on account of the said business or the proprietor or proprietors thereof and subject to the approval of the Board of Trade to sell the real and personal property and things in action of the said business by public auction or private contract and either as a whole or in parcels." Then (2.) to open a banking account, and (3.) to employ a solicitor or other agent, which I need not trouble about, and (4.) to pay the debts of the business. "(5.) To compromise any claim of whatsoever nature or character by or against the said business or the proprietor or proprietors thereof and generally all questions which may in any manner relate to or affect the assets of the said business or the realisation or distribution thereof," and (6.) to execute documents, and (7.) with the consent of the Board of Trade, apply to the High Court or a judge for anything which may be necessary. "(8.) To apply to the Board of Trade for permission to do any other act or thing incidental to or necessary for the realisation or distribution of the assets of the said business or to confer such other power or powers on the controller as may be expedient." Those, I think, are all the material provisions of the order.

The question is: Can the controller, either in the name of the firm or in his own name, sue the new defendant, who is the executor of Mr. Faber, for the moneys which had been received by Mr. Faber in the circumstances which I have mentioned? The defendant says that the controller cannot do so, inasmuch as they are not sums that can be said to be due to or held for the business, and that the amount of them that is due to the business, or held for or on account of the business, cannot be ascertained until the partnership accounts have been taken, because the defendant, as representing Mr. Faber, says, that although this money was received, and had to be accounted for in some way to the partnership, Mr. Faber had claims against the partnership for various things, which I need not specify, which would have to be taken into account when the partnership accounts were taken; and that until

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that is done, it is impossible to say what sum he held for or on account of the partnership. He also takes the technical point that the controller can only sue in the firm's name, and that in that case he is suing the defendant in the defendant's name because the defendant is a member of the firm; and that, the defendant says, is not a mere technicality; although it may be a technicality in a sense, it shows that there is substance and reason in his first substantial contention—namely, that he cannot be said to be holding these sums for or on account of the firm.

Prima facie, of course, looking at the law apart from these Acts of Parliament, there cannot be such a thing as a sum due to a business, it is due to the individuals who constitute the firm and carry on the business, but it has been held in several cases that a business, by these Acts, has been made sufficiently an entity at any rate to make it possible to have sums due to the business, and to deal with it as sums due to the business, and the question is really whether this doctrine goes sufficiently far (at least that is what seems to me to be the question) as to make the business a separate entity so that it can sue its partners, and, if it cannot, whether the controller, in his capacity, appointed under the Act, can sue in his own right. It is difficult to see how these Acts of Parliament give a right, which did not exist before, to members of a partnership in the firm name, or in their own name as individuals, to sue another member of the partnership, even after the dissolution, for sums which he happens to have in his hands, without taking the partnership account, in order to ascertain how much is in fact held by him for other persons, and not for himself to satisfy his own share of the partnership assets and profits. Suppose the firm to consist of a single individual, if this contention be right, the controller, using the name of the firm, can sue the individual in the single individual's name; there would not be any particular question of accounts in that case—in fact there would not be any; but it is a curious thing that the individual who has money in his hands should be compelled to hand over to the controller sums of money, which are due to him, because the controller is in charge of

the business. I do not know that it was suggested in argument, but it has been suggested since, that some difference may be made by Order XLVIII.A, r. 10, of the Rules of the Supreme Court (June 19, 1891). The rule is this: "The above rules shall apply to actions between a firm and one or more of its members, and to actions between firms having one or more members in common, provided such firm or firms carry on business within the jurisdiction, but no execution shall be issued in such actions without leave of the Court or a Judge." That does not seem to me to alter the position as I have stated it that exists between partners in a firm. It applies the previous rules to actions between a firm and its members. Of the previous rules I think rr. 1 and 2 are the only ones which apply to an action brought by a firm. Rules 3, 4, 5, 6 and 7 apply to actions and the procedure in actions brought against a firm. Rule 8 applies to execution of judgment against a firm, and r. 9 applies to the attachment of debts owing from a firm. The rules do not in any way, as it seems to me, alter the substantive law as it existed before, or alter the rights which in law and in equity partners have one against the other; all they do is to provide that the procedure which is laid down in the order shall apply to actions between partners and that the firm name may be used for those actions, and other procedure may go on in those actions just as it may in other actions, Therefore, I do not think that the controller, using the firm's name, has any greater rights than the firm itself would have, and I do not think the firm could, in circumstances like the present, demand that the money in the hands of the partner should be handed over to the firm, that is to say, to the individuals constituting the firm other than the partner, because the action is brought in the firm's name.

The position of the controller must now be considered. If he were in the position of a trustee in bankruptcy, who has all the powers and rights of action vested in him, not for the benefit of the particular partners necessarily, but for the benefit of everybody, then it seems to me that he probably could sue—I only say "probably," because

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it is not necessary to decide the point. But he is not in the position of a trustee; the outside powers that he has are the powers of a liquidator in a voluntary winding up of a company, and a voluntary liquidator must sue in the name of the company and has only the rights of the company. There is nothing to constitute a business an entity to the extent that is necessary to enable it to sue one of its members apart from and irrespective of the fact that that member is a member of the partnership. It may be that this is a casus omissus; that when these Acts were passed this sort of case was not contemplated, and that all that the framers of the Act were thinking of was debts that were due from outside debtors, if I may call them so. I may be wrong about this, but this decision, which is that the controller cannot sue as he has done in this action and that there ought to be judgment for the defendant, does not seem to me to leave the case without a way of getting at the defendant for such sums as he may really have to account for to the partnership, speaking of the partnership as an entity, that is to say to the other partners. The enemy partners' interests, as it seems to me, could be vested in a custodian, and the custodian could then have accounts of the partnership taken and the defendant made to pay what is properly due from him on the taking of the accounts. Therefore, it does not leave the defendant in a position in which he may keep this money in his hands and never account for it to anybody. There is a way of getting at it. I think the controller in this case has taken the wrong way of getting at it, that the action which he brought is wrongly conceived, and that, therefore, there must be judgment for the defendant with costs and the appeal must be allowed.

WARRINGTON L.J. The action in which this appeal arises is an action brought by the controller appointed under the Trading with the Enemy Acts of the business in this country of the firm of Arnold Otto Meyer & Co. in the name of the firm and in his own name against Augustus George Faber, a former partner in the firm, and continued since his death

against his executor, to recover certain moneys alleged to be owing to or held for or on behalf or on account of the said business or the proprietor or proprietors thereof. The question is whether the action is maintainable. Eve J. has pronounced judgment for the plaintiffs for the amounts claimed; the defendant, the executor of Faber, appeals. The appellant's objections are twofold. First, he says that according to well settled principles of the law of partnership an action cannot be brought in the firm name against a partner in the firm, inasmuch as that name is merely a collective description of all the partners, and the partner against whom it is brought would be both plaintiff and defendant, an impossible position; and further, that the objection is not cured by the addition of the controller's name, inasmuch as he has no independent right of action but merely represents the proprietors of the business of which he is controller—namely, the partners. The objection is of a technical character, but is also of some substantial importance. Secondly, he says further that money got in by one of the partners in a firm can only be recovered in an action by the other partners for an account of the dealings and transactions of the partners in which it would be open to the defendant to show that the money alleged to be in his hands belongs wholly or partially to himself, or even that a larger sum is due to him. This objection is of a substantial character. The answer put forward by the respondent to both objections is that according to the true construction and effect of the Trading with the Enemy Acts a business of which a controller is appointed is thereby created a statutory person resembling an incorporated company, and that an action can be brought by that persona to recover moneys held by any person for it or on its account just as such an action could be brought by a limited company or by a liquidator in its name, and further, that such persona is properly described by the name of the firm, or if not that the Acts and orders made thereunder may, and in this case do, authorize an action on behalf of that persona in the name of the controller.

At the outbreak of war, Mr. Faber, a British subject resident

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in this country, and three other persons, German subjects resident in Germany, were carrying on business in partnership under the style or firm of Arnold Otto Meyer & Co. in London, Faber being the managing partner. The outbreak of war, of course, dissolved this partnership. In the month of October, 1914, when the moratorium had expired or was about to expire, Faber applied for and obtained the sanction of the Home Office to his collecting the assets of the firm and discharging its liabilities. This he proceeded to do, and at the date of the order of the Board of Trade hereinafter mentioned, he had got in a large sum of money representing assets of the business, including two sums of 15,000*l.* and 12,500*l.*, cash furnished by the German partners, and had discharged all or nearly all the liabilities of the firm. The sums claimed by the plaintiffs are two: (1.) 4087*l.* 2*s.* 11*d.*, made up of 893*l.* 12*s.* 6*d.*, the balance to Faber's debit on a ledger account between him and his firm, such balance representing moneys drawn on account of profits under a power conferred by the articles of partnership, and 3193*l.* 10*s.* 5*d.*, alleged to be a balance in his hands, resulting from transactions since the outbreak of war, and (2.) a cash balance of 427*l.* 11*s.* 7*d.* transferred by him from the firm's account to that of himself, on the conclusion of the winding up conducted by him. The plaintiffs also claimed a sum of 230*l.*, the value of certain furniture of the firm in the defendant's hands. This sum the defendant is, I understand, willing to pay, if he has not already paid it, and no question as to it now arises. On November 23, 1918, the Board of Trade made an order under s. 3, sub-s. 3, of the Trading with the Enemy Act, 1918, that the assets of the business be realized and distributed, and the plaintiff Bostock was thereby appointed controller to control and supervise the carrying out of the order and to conduct the realization and distribution of the assets of the business. Amongst other powers conferred upon him was a power to get in and collect all moneys owing to or held for or on behalf or on account of the business or the proprietor or proprietors thereof. No specific authority or direction as to the institution of actions for the recovery of such moneys was given. Following on a

report by the controller to the Board of Trade, in which it was stated that the 4087*l.* 2*s.* 11*d.* appeared to be due from Faber, but that he maintained he had certain cross-claims against the "estate," the Board of Trade in a letter dated November 19, 1919, written and signed by H. E. Burgess on their behalf, gave the controller the following direction: "A. G. Faber. I think you should call upon Mr. Faber to furnish immediately particulars of his alleged claim against the firm and if in your opinion such claim is inadmissible and he declines to pay the amount appearing to be due by him to the firm, you should instruct your solicitors to take proceedings to recover the amount if you are satisfied as to his financial position." If the action was one which could be maintained I think this letter was sufficient authority for commencing it. After some correspondence between the controller and Faber, the writ in this action was issued on May 3, 1920, in the name of Arnold Otto Meyer & Co. as plaintiffs. The name of Mr. Bostock was added by amendment on July 29, 1920. Faber died on October 2, 1920, and subsequently the usual order was obtained for carrying on the proceedings against the executor, the defendant, Robert William Elder.

It is clear that unless the well settled law of partnership has been altered by the provisions of the Trading with the Enemy Acts the action could not be maintained. A partner cannot be a creditor of or a debtor to his firm or sue his firm or be sued by it, inasmuch as the English law does not recognize the existence of a firm as distinct from the members of it; and further, in an action by one or more partners, whether using the name of the firm under Order XLVIII.A, r. 10, or not, against a co-partner alleging that money is due from the defendant to the plaintiffs in connection with the affairs of the firm, whether the claim arises in respect of transactions during the continuance of the partnership, or in the course of the winding up of its affairs after dissolution, the only relief which the plaintiff could obtain would be an account of the dealings and transactions of the partners. The present action, whatever else it may be, is not an action by the German partners against Faber.

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It is necessary, therefore, to consider and determine whether according to the true construction and effect of the Acts such an action as the present can now be maintained at all, and, if it can, whether it is properly framed. The relevant statutes are the Trading with the Enemy Amendment Act, 1916, and the Trading with the Enemy Amendment Act, 1918. The orders in the present case were made under powers conferred by the second Act. Under the Act of 1916 the Board of Trade may in the case of a person, firm or company as to whom certain conditions, existing in the present case, are fulfilled, make an order requiring the business of that person, firm or company to be wound up and may appoint a controller to control and supervise the carrying out of the order and if the case requires to conduct the winding up of the business. The Board has authority to confer on the controller such powers as are exercisable by a liquidator in a voluntary winding up of a company. If these powers were conferred on the controller he would, I apprehend, be thereby authorized to bring in the name of the person, firm or company, such actions as the person, firm or company might itself bring, but I can find nothing in the statute conferring on the controller a right of action which the person, firm or company would not have had. Nor is there enough in the statute to enable me to come to the conclusion that the business of the person, firm or company becomes a legal persona, distinct from the person, firm or company, and capable of bringing an action which could not have been brought by the person, firm or company. If the business were thus made a distinct legal persona it would follow that it might even bring an action against the person or firm which had carried it on; of any idea of conferring such a power there is not a trace.

It has been decided that the assets of a business so being wound up are not necessarily the same as the assets of the person, firm or company, nor are the liabilities of the business necessarily identical with those of the person, firm or company: see *In re W. Hagelberg Aktien-Gesellschaft* (1); *In re Kastner &*

(1) [1916] 2 Ch. 503.

Co. (1); and *In re Th. Goldschmidt, Ld.* (2) It has also been decided that the controller, if so authorized by the Board of Trade, may bring an action in the name of the firm without being met by the defence that the plaintiffs are an enemy firm: *Continho Caro & Co.* v. *Vermont & Co.* (3) But none of these cases goes the length of establishing the proposition that the controller can maintain an action which the person, firm or company could not have maintained.

The Act of 1918, by s. 3, sub-s. 3, enables the Board of Trade, where a person, firm or company has ceased to carry on business, and the conditions above referred to are fulfilled, to make an order for the realization and distribution of the assets of the business, and by sub-s. 4 the provisions of the Act of 1916, relating to orders for the winding up of a business, the appointment of controllers and their powers, are made applicable to orders made under s. 3. In my opinion this carries the case no further.

The result is that, in my opinion, neither moneys in the hands of a partner, as the result of his collection and distribution of the assets of a dissolved partnership, nor moneys standing to his debit in the books of the firm, are moneys due to, or held by him for, the firm or the proprietors thereof. They could not be recovered by an action in the name of the firm, nor even by an action by the other partners, except after an account has been taken of the dealings and transactions of the partners. The provisions of Order XLVIII.A, r. 10, were not relied upon, or even referred to, by counsel for the plaintiffs; probably for the good reason that they would not support their case. Under this rule an action may be brought in the name of a firm against one of its members, but this is a mere matter of procedure, and does not affect the rights of parties, or create causes of action which would not otherwise exist. Moreover, I take it, in such a case the name of the firm would be a compendious expression for "the partners other than the defendant"; and, as I have said, the present action, whatever else it is, is not an action by them.

(1) [1917] 1 Ch. 390. (2) [1917] 2 Ch. 194.
(3) [1917] 2 K. B. 587.

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With all respect to the learned judge, I am of opinion that the present action was not maintainable and that it ought to have been and ought now to be dismissed with costs, here and below.

YOUNGER L.J. stated the facts as above set out and continued: Now it will be observed that with the exception possibly of the claim in respect of the furniture the plaintiffs' claim is not one against the defendant for any specific property. The sums claimed were not moneys standing to a separate account or otherwise earmarked, or indeed existing. The claim was a claim in debt and in debt only, and to that claim the defence was twofold. First, while not in substance denying the correctness of the plaintiffs' figures as figures, the defendant asserted that if and when an account of his partnership dealings and transactions was taken, it would be found that he was then creditor and not debtor on that account. Secondly, he asserted that after dissolution of a partnership a partner did not become debtor for anything or to anybody unless and until the partnership accounts had been finally taken and a balance had been ascertained by each partner to the other, and that his position in that respect towards his former partners was in no way altered by the Trading with the Enemy Acts or by the order of November 23, 1918, and the appointment of Mr. Bostock as controller thereby made. The defendant accordingly maintained that the action against him in the form in which it was brought could not be maintained. These defences were rejected by the learned judge. He ordered payment to be made by the new defendant to the controller and without any deduction or set-off of any kind of the 4087*l.* 2*s.* 11*d.*, the 230*l.* 16*s.* 8*d.* and the 427*l.* 11*s.* 7*d.* claimed by him, and he directed an account of the moneys received by the defendant from the rubber companies. Now I pause here to observe that the defence so put forward by the defendant is not one of form: it is substantial to a degree. It is, in this case, quite impossible, even now, for any one to say whether or not on the taking of the ordinary partnership accounts, the defendant's estate will here stand debtor or

creditor. It may well be creditor for a large amount. The defendant, for instance, asserted that his share of profits up to August 4, 1914, would be not less than 1000*l.*: there is no evidence to the contrary. He claimed to be entitled to 1700*l.* in respect of his 2 per cent. commission on the profits of Behn Meyer & Co., and there is no evidence that he is not so entitled. He has received no allowance or remuneration in respect of his services in winding-up the affairs of the dissolved firm, and I conceive that on an account taken he would in accordance with ordinary practice be entitled to a substantial sum for that service. But above all, while, as I have above stated, the defendant's German partners did on the outbreak of war provide 27,500*l.* to meet pressing liabilities, it appears now also that they have collected and retained the outstanding credits of the firm in Switzerland amounting to approximately 21,000*l.*, and it is by no means clear that they have not collected and retained as well some at least of the Austrian and other foreign credits of the firm amounting to 7000*l.* and upwards. It is accordingly impossible to assert that there cannot be, nor does the plaintiff deny that on the taking of the partnership accounts there may be, as between the defendant and his late partners, a balance, even a substantial balance, due to the defendant or his estate.

In these circumstances the new defendant complains strongly of the order which has been made against him. And it was not contended before us that apart from the winding-up order of November 23, 1918, and the appointment of controller thereby made, any such order could be supported. It was fully conceded that in no action brought against the defendant by his former partners either in their own or, if such form of procedure were permissible, in the firm name, could any such order have been made. It was not disputed that in any such proceedings no liability could in the circumstances be established against the defendant except as the result of a general account of partnership dealings and transactions. It was contended, however, that the defendant's position was entirely altered by the winding-up order and the appointment of a controller, the effect of which was to convert the defendant

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into a debtor to Mr. Bostock for sums for which prior to his appointment as controller the defendant was not indebted at all, and that too, without any relief open to him in respect of set-off, counterclaim, or otherwise. And the learned judge has upheld that contention. Is it well founded? The answer involves some consideration of the scope and purpose of the provisions of the Trading with the Enemy Acts relating to the winding up or control of what have come to be described, quite inaccurately, as enemy businesses.

The scope and purpose of these Acts in this respect have been set forth in a series of decisions none of which were questioned in the arguments before us. These decisions make it plain that the paramount purpose of the Acts in this matter is to restrict the operation of or to bring to an immediate end businesses in Great Britain which are obnoxious to them. To that purpose everything else is subordinate. To attain it the Act of 1916—and here we may confine ourselves to that statute, for as the learned judge says, s. 3, sub-s. 3, of the Act of 1918 merely extended to businesses which had ceased to be going businesses the powers conferred upon the Board of Trade by the Act of 1916—the Act of 1916 has adopted the conception unfamiliar if not unknown before the war of a business as a thing distinct from any other business or property of its owner—as an entity having rights and liabilities of its own. The Act of 1916 in the winding up of a business under its provisions directs that the liabilities of the business are to be discharged out of its assets, and it details—in a rough and ready fashion, it is true: see *In re W. Hagelberg Aktien-Gesellschaft* (1)—the so-called creditors of the business whose claims are in a somewhat impressionist order of priority alone to be met out of its assets. But the important matter to note—the matter which explains and perhaps justifies the specific provisions of the Act as to the creditors to be recognized and the vagueness of its provisions as to the destination of the surplus assets of a business—is that the winding up directed by the Act is not a liquidation of the affairs of its owner, whether that owner be a company,

(1) [1916] 2 Ch. 503, 511.

a firm or an individual. It is the winding up of a business which alone is directed—of a particular kind of business—one, putting it shortly, owned or controlled by enemy subjects. All property outside the business of its owner, whoever he may be—for the owner need not necessarily be an enemy subject at all—is left quite untouched by the Act, and—here is the important matter—any creditors of the business not completely satisfied as a result of the winding up and all other creditors of the owner whose claims have not even been touched by the winding up are left with their original rights intact against the owner and against any other property of his which may, under the ordinary law, be made available to meet their claims. This is the scheme of the Act, a scheme involving notions hitherto quite foreign to our law, and the statute itself has to be referred to in order to ascertain what, either expressly or by reasonable implication, are the limits set to them. To attain its purpose the statute has in definite respects abrogated the general law in relation to the administration of assets of the company or firm or individual affected. But I take it to be now clearly established that unless the Court is by the terms of the statute required so to do either expressly or by reasonable implication, it will not treat the Act as having invaded the ordinary legal rights of any persons or class of persons further than is actually necessary for the attainment of the primary purpose in this regard of the statute. This conclusion will be found illustrated in many cases. I will take five as examples. *In re Kastner & Co.* (1); *Continho Caro & Co.* v. *Vermont & Co.* (2); *In re Fr. Meyers Sohn, Ld.* (3); *In re Dieckmann* (4); and *Holt* v. *A. E. G. Electric Co.* (5) The first two of these cases are illustrations of the extent to which the general law will, when the terms or purpose of the statute so require, be treated as abrogated. *In re Kastner & Co.* (1) deals with the position under the Act of secured creditors of a business being wound up under it. Not

(1) [1917] 1 Ch. 390.
(2) [1917] 2 K. B. 587.
(3) [1917] 2 Ch. 201; [1918] 1 Ch. 169.
(4) [1918] 1 Ch. 331.
(5) [1918] 1 Ch. 320.

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only does the statute in express terms deal with secured as well as unsecured creditors and their rights, but the immediate purpose of the statute requires that their rights as such must be affected if the obnoxious business is to be effectively stopped, or the undertaking is to be disposed of. The extent accordingly to which these rights may be affected is indicated in *In re Kastner & Co.* (1) The second case of *Continho Caro & Co.* v. *Vermont & Co.* (2) shows that as it is necessary for the purposes of the Act that the debts of an enemy business ordered to be wound up shall be collected, so an action brought in the name of the firm by a controller will not be stopped by the defence that the plaintiffs are an enemy firm. Illustrations of the converse principle will be found in the remaining three cases. The fragmentary character of a winding up under the Act, the essential difference between such a winding up and the liquidation of a company or the bankruptcy of a firm or individual is shown by *In re Dieckmann.* (3) An instance in which when the Legislature has in the statute itself desired for the purpose of the statute to alter the general law it has done so in express terms will be found referred to in *In re Fr. Meyers Sohn, Ld.* (4), while the strictness with which is read any provision of the Act affecting the rights of individuals outside it—e.g., the rights of creditors for whose claims no provision is made in a winding up directed by the Act—is illustrated by the case of *Holt* v. *A. E. G. Electric Co.* (5) The result of all these cases—and there are others to the same effect, I think—is that the main purpose of the Act being attained, the general law is not to be treated as abrogated further than the express terms of the statute require. "Beyond what is strictly necessary for the immediate purposes of the statute," as I ventured to say in *In re Fr. Meyers Sohn, Ld.* (4), when dealing with the rights of shareholders in a company whose business was being wound up under the Act, a decision is to be preferred which "involves no interference by an emergency Act like the present with a

(1) [1917] 1 Ch. 390.
(2) [1917] 2 K. B. 587.
(3) [1918] 1 Ch. 331
(4) [1917] 2 Ch. 201, 204.
(5) [1918] 1 Ch. 320.

settled, carefully considered, elaborate, and still existing scheme of legislation regulating limited companies in the United Kingdom." The same observation may, I think, justly be made with reference to the well ascertained rights and liabilities of partners inter se, codified as these now are by statute. Accordingly it is, as I think, with these principles in mind that the Court must approach the consideration of the question now before us—namely: Whether the immediate effect of the winding-up order in this case was to convert into a debtor for the considerable sums which he has been ordered to pay, this defendant who, before that order was made, was no more than an accounting party with cross-claims open to him possibly exceeding in amount those made against him. There is one special circumstance emerging in this case which makes it especially incumbent upon the Court to inquire narrowly whether such is the effect of the order. The controller in this case has in hand undistributed assets amounting to between 10,000*l.* and 12,000*l.* Whether all or any part of that fund is required for payment of debts of the business Mr. Gover was unable to tell us. With so large a fund undistributed after a controllership of nearly 4½ years it may perhaps safely be presumed that any admitted liabilities still unsatisfied are relatively trifling. Certain, however, I think it is that these proceedings were not instituted by the controller under any sense of compelling necessity to collect the moneys claimed to discharge business liabilities. The absence of any such necessity affects, of course, in no way the competence of the action if it be otherwise competent. But the fact that the order of the learned judge, if it stands, will in all probability only serve to increase the surplus assets of the business at the expense of its only British partner and otherwise than in accordance with his obligations to his enemy co-partners, must, as I say, cause the Court narrowly to inquire whether the winding-up order can have the effect suggested. And, in my opinion, it has not. It was, I think, conceded, but if not conceded it must I think be clear, that the winding-up order by itself, i.e., with no controller appointed, would have had no such effect. This is a

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very important consideration. For the appointment of a controller is no necessary part of the machinery for the winding up of a business as contemplated by the Act. In a voluntary liquidation of a company, s. 186 (ii.) of the Companies (Consolidation) Act, 1908, requires that a liquidator shall be appointed. Such a liquidation cannot proceed without a liquidator, but the appointment of a controller under this Act is purely permissive and in no way essential. By s. 1, sub-s. 2, of the Act of 1916, when the Board of Trade make a winding-up order "they *may* at the same time or at any time subsequently, appoint a controller to control and supervise the carrying out of the order, and, if the case requires, to conduct the winding-up of the business." And it will be noticed that s. 1, sub-s. 3, of the Act of 1916, which is what I may call the distribution section, says nothing at all about a controller being either the person or the necessary person to make the distribution. Nothing in the Act is I think clearer than this, that it contemplates the owners of a business being themselves left to close down in accordance with the Act their business which is ordered to be wound up. Suppose then that in the present case the Board of Trade had made no such appointment and had left the winding up of the business directed by the order to be carried out by the partners themselves. There is in that event no provision of the Act which would have enabled the defendant's partners, had they been in England, to recover from the defendant the sums which he has here been ordered to pay to the controller or to proceed against him for anything other than the ordinary partnership accounts. This, as I have said, was not really contested. But if that be so, then this new right of the firm, if I may so describe it, indicated by the order here appealed from, and this new burden on the defendant is conferred and arises solely by an appointment of a controller which need never have been made; it is effected by the appointment of a person whose function when he is appointed is merely "to control and supervise the carrying out of the order and to conduct the winding-up"—an operation which the Act assumes would, if he were not appointed, go on without any

such supervision. These are surely strange words to use in relation to the status or function of a controller if the intention of the Legislature was to enact that, on his appointment and by reason of it, creditors might be converted into debtors and rights or liabilities of persons affected by the winding up might at once be altered to their detriment both in quality and character. But in the view of the respondent this is what does happen. And that view has the support of the judgment of the learned judge. "The controller," he says, "is the creation of an exceptional war measure; he is a statutory being; he has statutory duties imposed upon him, and, as it appears to me, there is vested in the Board of Trade authority under the statute to clothe him with all such powers as may be necessary for the purpose of carrying out the statutory objects for which he is appointed." Believing, as I do, that consistently with its main purpose this statute has to be construed most strictly in favour of the individual in order to preserve so far as possible all his pre-existing rights, I am unable to concur in this view of the controller's position, and I am confirmed in this attitude of mind when I see, as I do, that nothing is vested in the controller and that the general powers which the Board of Trade are by the sub-section authorized to confer upon him are expressed in the terms of the powers exercisable by a liquidator in a voluntary winding up of a company, by which, as I think, are meant primarily, if not exclusively, those referred to in s. 186, (iv.), of the Companies (Consolidation) Act, 1908 (see *In re Th. Goldschmidt, Ld.* (1)), all of them powers of the company and exercisable in its name. When I note this I am confirmed in the view that the controller is no more than the efficient agent appointed to carry out the winding up which, although less efficiently, can, in the view of the statute, quite well be carried out by the owners of the business without him. And I can find no trace in the Act that the controller is thereby or can be by the Board of Trade invested with power to enforce any claim either in his own or in any other name which after the winding-up order but before his own

(1) [1917] 2 Ch. 194, 200.

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appointment was, and but for his appointment would have remained, unenforceable by any one. This conclusion as to a controller's position absolves me from the necessity of inquiring whether on any true view of the facts here the present claim to the four sums of money above mentioned—money in no sense specific—could be said to be a claim to recover assets of the business within the meaning of the statute. It also dispenses me from the necessity of considering whether such a claim as is here made against the defendant could properly be made by action in the firm name. In the position in which things stood when this winding-up order was made I doubt whether this claim against this partner in a dissolved firm could in any true sense be treated as a claim to an "asset of the business." I do not myself see how, under this head, there can in the circumstances of this case be any such claim against the defendant except in respect of any money found as a result of the taking of an account of partnership dealings and transactions to be due and owing from him to the other partners. I can conceive that in view of Order XLVIII.A, r. 10, a claim to such a balance may be made in the firm name, but I do not so decide. It is enough to say that at the moment no claim against the defendant has been shown to be competent except one at the instance of his co-partners, or their successors in sufficient interest, and that such claim is one for an account, and for an account only. I desire to add that in no circumstances, in my judgment, could the order stand against the new defendant either in respect of the sum of 893*l.* 12*s.* 6*d.* or without deduction or set-off in respect of the 3193*l.* 10*s.* 5*d.* The sum of 893*l.* 12*s.* 6*d.* properly received by the defendant before the dissolution of his firm to be spent as he chose can, I think, no more be an asset of the business than any sum properly drawn by the defendant out of the business in any previous completed year of the firm's existence. The only condition on which he could in any circumstances be called upon to repay this sum has never been fulfilled. In my judgment, too, neither can the judgment in respect of the 3193*l.* 10*s.* 5*d.* in any circumstances stand intact. I do not see how there could be denied to the defendant

some proper allowance in respect of the expense and trouble to which he was put in conducting the winding up of this business prior to the winding-up order. In my own experience of the administrative work of these windings up such an allowance was, I think, almost invariably made.

Lastly, I desire to add that I am not, as at present advised, prepared to accept as correct on the grounds on which it was based, the decision of Russell J. in *In re Vulcaan Coal Co.* (1) The order there made by the learned judge was, I think, fully justified on other grounds, but as at present advised and for reasons already sufficiently indicated in this judgment, the actual decision in the view it takes of the position of the controller impinged upon the rights, as it seems to me, of a creditor of the owners of a business being wound up who, at the same time, was their debtor in respect of the business itself, to an extent which, so far as he was a creditor, is not warranted by s. 1, sub-s. 7, of the Act of 1916, and, so far as he was a debtor, is neither justified by the immediate purpose of the statute nor by any provision contained in it. I need say nothing about what I may describe as the Treaty of Peace objection to the competence of this action. I entirely agree with the view of the learned judge on this point. On the whole, however, I am of opinion that this appeal should be allowed and the action be dismissed with costs.

Appeal allowed.

Solicitors for appellant: *Roney & Co.*
Solicitors for respondents: *Walker, Martineau & Co.*

(1) [1922] 2 Ch. 60.

W. I. C.

C. A.
1923
ROCHE J.
March 21.
C. A.
May 31.

STEINBERG *v.* SCALA (LEEDS), LIMITED.

[1922. S. 1191.]

Infant—Contract to take Shares in Company—Allotment—Repudiation during Infancy—Right to recover Money paid in respect of Shares—Total Failure of Consideration.

The plaintiff, while an infant, applied for shares in a company and paid the amount due on allotment. The shares were duly allotted to her, and she paid the further amounts due on allotment and on the first call. No dividends were received by her nor did she attend any of the meetings of the company. Eighteen months after allotment, while still under age, she repudiated the contract, and asked for repayment of the money paid by her to the company. She subsequently brought an action to recover the money. It was proved at the trial that the shares had at one time been of substantial value:—

Held, that the only ground on which the plaintiff could succeed was by showing there had been a total failure of consideration; that this she had failed to do, and therefore that she was not entitled to recover back the money paid in respect of the shares.

Holmes v. *Blogg* (1818) 8 Taunt. 508 and *Ex parte Taylor* (1856) 8 D. M. & G. 254 followed.

Hamilton v. *Vaughan-Sherrin Electrical Engineering Co.* [1894] 3 Ch. 589, unless distinguishable on the ground that the shares in that case were of no marketable value, as to which there was no evidence one way or the other, overruled.

Corpe v. *Overton* (1833) 10 Bing. 252 explained and distinguished.

Decision of Roche J. reversed.

ACTION.

On February 5, 1920, the plaintiff, Miss Tulip Steinberg, who was then of the age of eighteen years, applied for an allotment of 500 ordinary shares of 1*l.* each in the defendant company on the terms of a prospectus dated January 21, 1920, issued by the defendant company. Under the terms of the prospectus the sum of 2*s.* per share was payable on application, the sum of 4*s.* per share on February 24, 1920, and the sum of 4*s.* per share on April 24, 1920. The defendant company accepted the application and on February 18, 1920, allotted to the plaintiff 500 ordinary shares of 1*l.* each in the capital of the defendant company. The plaintiff paid the defendant company the sum of 50*l.* on making the application and two further sums of 100*l.* each on February 24 and April 24, 1920, as provided by the terms of the prospectus. Her name

was duly entered on the register as the holder of the shares. She did not attend any meeting of the defendant company and did not receive any dividend on the shares.

On December 13, 1921, the plaintiff by her solicitors wrote a letter to the solicitors of the defendant company repudiating the allotment of the shares and claiming the return of the 250*l.* paid by her to the defendant company. The defendant company refused to take steps for the cancellation of the allotment of the 500 shares or the removal of the name of the plaintiff from the register or to repay the 250*l.*

On August 1, 1922, the plaintiff by her next friend issued the writ in this action in the Leeds District Registry, claiming (1.) a declaration that the allotment to her of the 500 shares standing in her name in the register of shareholders of the defendant company was not binding on her and ought to be cancelled; (2.) that the register of the defendant company might be ordered to be rectified by striking out the name of the plaintiff as a shareholder in respect of the said 500 ordinary shares; (3.) that the defendant company might be ordered to repay to the plaintiff the sum of 250*l.* paid by her to the defendant company in respect of the shares together with interest at the rate of 5 per cent. per annum from the several dates of payment thereof till the date of repayment; and (4.) that the defendant company might be restrained by injunction from enforcing any calls made, or to be made, on the plaintiff in respect of the shares.

The action was tried by Roche J. for Astbury J. at the Leeds Assizes on March 21, 1923. It appeared from the evidence at the trial that fully paid shares of the defendant company had been dealt with at prices ranging from 1*l.* down to 9*s.* or 10*s.* a share.

C. J. Frankland for the plaintiff.

T. P. Perks for the defendant company.

ROCHE J. [after stating the facts continued:] The case must therefore be decided upon the basis that a minor has become a shareholder; that she has been entered upon the

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register of the defendant company and has remained so entered for at least eighteen months, or more, without protest on her part.

The question is whether, under those circumstances, she is entitled to the relief claimed, which resolves itself ultimately into a declaration that she is entitled to avoid the contract, giving her a right to have her name removed from the register, and whether she is further entitled to recover the 250*l.* which she claims. On the authority of Stirling J. in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1), I am compelled to decide that the plaintiff is so entitled. I need not say that I should not venture to question the decision of that very learned judge without great hesitation and I do not question it. I only say that if there were not that direct authority it would seem to be a very arguable point whether the holding of the shares, and the remaining on the register of a company without protest and with all the opportunities of taking part in voting and receiving payment of a dividend, are not an enjoyment of a consideration, and whether such enjoyment is not sufficient to preclude a plaintiff, though an infant, from recovering moneys paid on the ground that no consideration has been enjoyed at the time when the application for the return of the money or rescission of the contract is made: whether, in short, the infant under such circumstances can say that no consideration has been enjoyed and that the consideration for the contract has wholly failed. It is unnecessary and wholly impossible for me to consider that matter because I can see no distinction between *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1) and the present case. It is true, as Mr. Perks has pointed out in his very helpful argument, that in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1) the liquidator had, before the application to the Court, removed the name of the infant shareholder from the register, but that in my judgment makes no difference. The liquidator and the Court had merely done in two successive stages what I am, in effect, doing in one. The cases cited by Mr. Perks of *Holmes* v. *Blogg* (2); *Ex parte Taylor* (3);

(1) [1894] 3 Ch. 589. (2) 8 Taunt. 508. (3) 8 D. M. & G. 254.

Corpe v. *Overton* (1), are all cases which quite rightly received attention in argument, but in my judgment they do not require further discussion by me because the whole matter is, in my opinion, summed up and decided by *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (2)

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I therefore give judgment for the plaintiff for the return of 250*l.* and a declaration that she has a right to rescind the contract to take shares.

C. A.

The defendant company appealed. The appeal was heard on May 31, 1923.

At the hearing of the appeal it was admitted that the respondent was entitled to repudiate the contract to take the shares and to have her name removed from the register of shareholders. The only question argued was whether she was entitled to recover back the money paid by her for the shares.

T. P. Perks for the appellant company. It is submitted that the decision of Stirling J. in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (2) was wrong, and that Roche J. if he had not felt bound to follow it would have decided in favour of the appellant company. The Court of Appeal is not however bound by that decision.

An infant is not entitled any more than an adult to recover money paid under a contract unless the consideration on which the payment was made has entirely failed : *Holmes* v. *Blogg* (3) ; *Ex parte Taylor.* (4) Stirling J. professedly puts his decision on that ground (5), but what he really does is to decide that because there was no pecuniary advantage to the infant that was the same thing as a failure of consideration. It is submitted it is manifest that is not so. Here the appellant company has done everything which on its part was the consideration for the payment of the money to it and no part of the consideration has in any sense failed. That, it is submitted, disposes of the case. There was nothing more

(1) 10 Bing. 252.
(2) [1894] 3 Ch. 589.
(3) 8 Taunt. 508.
(4) 8 D. M. & G. 254.
(5) [1894] 3 Ch. 589, 594.

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which the appellant company had bargained to do or could do. The shares might have gone to a premium and the respondent had therefore a chance of making a profit.

[YOUNGER L.J. referred to the statement as to *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1) in Buckley on Companies, 9th ed., p. 67.]

Corpe v. *Overton* (2) is distinguishable. There the money was paid by the plaintiff, an infant, in advance towards the purchase of a share in the defendant's trade, to be retained by the defendant as a forfeiture if the plaintiff failed to fulfil an agreement to enter into a partnership with the defendant. When that agreement was rescinded there was no consideration for the money paid, and it was held that the plaintiff was entitled to recover it back.

[YOUNGER L.J. There the plaintiff never had the status of a partner.]

In *In re Laxon & Co.* (3) it was held that the contract of an infant being not void but only voidable, his signature to the memorandum of association of a company was the signature of a "person" within the meaning of s. 6 of the Companies Act, 1862.

The respondent is not assisted by the Infants Relief Act, 1874.

It is submitted that the ground on which the respondent must put her case, namely that there has been a total failure of consideration, fails, and that this appeal ought therefore to succeed.

Compston K.C. and *C. J. Frankland* for the respondent. The present case is indistinguishable from *Corpe* v. *Overton* (2), because the plaintiff there had something which was of some advantage to him.

[WARRINGTON L.J. You have to make out that there was a total failure of consideration in this case.]

The plaintiff here never attended any meeting of the company and no dividend has ever been paid her. She has never derived any advantage except from the fact of her being on

(1) [1894] 3 Ch. 589. (2) 10 Bing. 252.
(3) [1892] 3 Ch. 555.

the register of the company. When rescission takes place its effect is to place the parties in the same position they would have been if the contract had never been made.

In *Holmes* v. *Blogg* (1) the infant was shown to have taken part in the management of the business and to have received a benefit from the profits earned. It could not therefore be said that the consideration had wholly failed. No doubt an infant would be precluded from recovering back money paid if it could be shown that she had derived some pecuniary advantage under the contract. But here the respondent has received no such advantage and is therefore entitled to recover back the money paid by her for the shares: *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (2)

T. P. Perks in reply.

LORD STERNDALE M.R. I think in this case the appeal must be allowed and judgment must be entered for the defendant company. In saying that I think I am agreeing with what would have been Roche J.'s own opinion if he had not felt himself bound, as indeed I think he was bound, by the decision of Stirling J. in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (2) I think I see a possible—I will not say more than that—distinction between this case and that before Stirling J. If that be not a valid distinction I am afraid I should have to say that I do not agree with that decision, although of course I differ from any judgment of Stirling J. with great hesitation and trepidation.

The action is brought for two objects: first, for rectification of the register of the defendant company by the removal therefrom of the plaintiff's name, as to which no question now arises because it is not opposed, and, secondly, for judgment for the recovery of money which the plaintiff has paid in order to become a shareholder in the company.

The plaintiff is a young lady still an infant, and when still more an infant some year or two ago she paid 50*l.* as a payment on application for shares in the defendant company and subsequently paid a further sum of 200*l.* for calls after the

(1) 8 Taunt. 508. (2) [1894] 3 Ch. 589.

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shares had been allotted to her, so that she paid altogether 250*l.* for shares in the defendant company. There was a question as to certain further calls being made and the plaintiff, who had found the 250*l.* out of money given to her, I think by an uncle, for the purpose of providing her with a dowry, could not find any more money, and then, awaking to the position that she had shares in a company on which there would be calls made and that she had not the money to meet them, she also awoke to the position that she was an infant and could rescind the contract, and she did so. There is no doubt that she was entitled to do so and to have the register rectified by the removal of her name therefrom. But then there came another question. She also wanted the 250*l.* back, and, to a certain extent, I think the argument for the respondent has rather proceeded upon the assumption that the question whether she can rescind and the question whether she can recover her money back are the same. They are two quite different questions, as is pointed out by Turner L.J. in his judgment in *Ex parte Taylor*. (1) He there says: "It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right upon his attaining his majority to elect whether he will adopt the contract or not." Then he proceeds: "It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it, but if he does pay for it during his minority he cannot on attaining his majority recover the money back." That seems to me to be only stating in other words the principle which is laid down in a number of other cases that, although the contract may be rescinded the money paid cannot be recovered back unless there has been an entire failure of the consideration for which the money has been paid. Therefore it seems to me that the question to which we have to address ourselves is: Has there here been a total failure of the consideration for which the money was paid?

(1) 8 D. M. & G. 254, 257, 258.

Now the plaintiff has had the shares; I do not mean to say she had the certificates; she could have had them at any time if she had applied for them; she has had the shares allotted to her and there is evidence that they were of some value, that they had been dealt in at from 9*s.* to 10*s.* a share. Of course her shares were only half paid up and, therefore, if she had attempted to sell them she would only have obtained half of that amount, but that is quite a tangible and substantial sum.

In those circumstances is it possible to say that there was a total failure of consideration? If the plaintiff were a person of full age suing to recover the money back on the ground, and the sole ground, that there had been a failure of consideration it seems to me it would have been impossible for her to succeed, because she would have got the very thing for which the money was paid and would have got a thing of tangible value.

The argument for the respondent is I think to this effect: That it is necessary, in order to show that the consideration has not entirely failed, to prove that the plaintiff has not only had something which was worth value in the market and for which she could have obtained value, but that she has in fact received that value. It was admitted that if she had in this case sold the shares and received the 125*l.* which would have been receivable according to one of the prices mentioned in evidence she could not have recovered the money back, but it is said that as she did not in fact do that and had only an opportunity of receiving that benefit, there has been a total failure of consideration. I cannot see that. If she has obtained something which has money's worth then she has received some consideration, that is, she has received the very thing for which she paid her money, and the fact that, although it has money's worth, she has not turned that money's worth into money, does not seem to me to prevent it being some valuable consideration for the money which she has paid. I cannot see any difference when you come to consider whether there has been consideration or not between the position of a person of full age and an infant. The question whether there

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has been consideration or not must, I think, be the same in the two cases. That is, on the face of it, an opinion opposed to the decision of Stirling J. in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1), unless this is a distinction, that in that case there was no evidence at all that the shares had any marketable value. I do not mean to say they had none, but there is no evidence one way or the other, and the learned judge does not seem to have addressed himself to the question whether that would make any difference. He seems, as far as I can make out, rather to have put as a test, whether the company was a prosperous one out of which money could be made or whether it was not. I cannot think that that is the true test and I am not quite sure that he applied it, but it looks to me rather as if he did. If the fact that these shares had a marketable value, whereas there was no such evidence in the case before Stirling J., is a valid distinction between the two cases, then that is not an authority. If that be not a valid distinction then, although I say it with great trepidation, I am afraid I do not agree with the decision of Stirling J. in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1)

There is only one other thing I wish to say. It was argued for the respondent that my decision is contrary to the judgment of the Court of Common Pleas in *Corpe* v. *Overton.* (2) I do not think it is so. The 100*l.* that was sought to be recovered in that case was in quite a different position from the money which the plaintiff sues to recover in this case. In that case there was an agreement that the infant and another person should enter into partnership, and there was also beyond that—the consideration for that agreement being, as it seems to me, the mutual promises of the parties—a further agreement that to secure the proper fulfilment of the contract when it was made, because it was for a future contract, the infant should deposit 100*l.* as a sort of security for the performance by him of the contract. That 100*l.* seems to me to be in a totally different position from the money which was paid in this case. It is quite true that in that case, in addition to the fact of it being a deposit in the

(1) [1894] 3 Ch. 589. (2) 10 Bing. 252.

way I have mentioned, the Court did say that it was recoverable as on a total failure of consideration. I think that is quite right. The promise of the partnership was not obtained by the payment of the 100*l.* The 100*l.* was paid down as a deposit for the due performance of the contract by the plaintiff, and when that contract was once rescinded of course there was no consideration for that 100*l.* having been paid and it had to be paid back.

I do not think that my judgment in any way conflicts with *Corpe* v. *Overton.* (1) It does or may conflict with *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (2) If it does, I regret to say that I do not agree with that case, and I think, for the reasons I have stated, that this appeal should be allowed and judgment should be entered for the defendant company with costs here and below.

WARRINGTON L.J. I am of the same opinion. This is an action brought by an infant suing by her next friend, first for rectification of the register of shareholders of the defendant company by removing her name therefrom, and, secondly, to recover the money which she has paid on application, on allotment and by way of first call. With regard to rectification of the register it is unnecessary to say anything, because the defendant company agrees that the register must be rectified by striking off her name and that she would be thereby relieved of the liability for the payment of any future calls. The only question we have to deal with is the repayment of the money she has already paid on those shares. The only ground upon which she asserts that she is entitled to have the money repaid is that there has been a total failure of consideration, and that she is therefore entitled to be repaid that money as in the ordinary case where a man has paid money and the consideration for that payment has wholly failed. In my judgment it cannot be said in the present case that there has been a total failure of consideration. She has in fact got the very thing she bargained for, and, not only the thing she bargained for, but the thing which every other

(1) 10 Bing. 252. (2) [1894] 3 Ch. 589.

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applicant for shares in this company bargained for. She was placed in exactly the same position as every other shareholder except that, being an infant, she was entitled if she pleased to repudiate the contract and so escape from any future liability. So far as the defendant company is concerned she has received neither more nor less than any other shareholder in the company. Under those circumstances it seems to me impossible to say that there has been a total failure of consideration.

But then it is contended that in the case, I suppose, of an infant as distinct from other persons suing for the recovery of money paid on the ground of failure of consideration, the question which has really to be determined is not whether there has been a total failure of consideration, but, using the expression used by Stirling J. in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1), whether the infant has derived any real advantage under the contract, and, on the authority of that case, it is said that unless the infant has derived some real advantage from the contract then she is entitled to recover the money.

In the first place the shares here are shown to have been of real substantial value, not merely of a nominal value. There were sales of fully paid up shares from 1*l.* down to 9*s.* or 10*s.* These shares were not fully paid up, but still that indicates that the shares were of substantial value, and therefore she has actually obtained a real advantage from having these shares. Although she did not sell them, still she was in a position to do so. That distinguishes the case, if it is necessary to distinguish it, from *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1), to which I have already referred; but I am bound to say, with the greatest respect for the very learned judge who decided that case, that in my view, in the case of an infant plaintiff seeking to recover money paid, the question is not whether the infant has derived any real advantage from the contract. I cannot see myself, in the case of an action to recover money actually paid, any difference between the position of an infant and of an adult,

(1) [1894] 3 Ch. 589.

and an adult can only recover money actually paid if there has been a total failure of consideration. In the present case the infant has received consideration which, from the evidence, is of value. But, whether it was valuable or not, she has received the very consideration for which she bargained.

I have nothing to add to what the Master of the Rolls has said about *Corpe* v. *Overton*. (1) Nothing I have said conflicts with the decision in that case, which was founded on a totally different state of facts.

I agree that the appeal ought to be allowed and judgment entered for the defendant company.

YOUNGER L.J. This plaintiff, while still an infant, applied on the prospectus of the defendant company for 500 shares of 1*l*. each. Those shares were in due course allotted to her in response to her application, her name was placed on the register in respect of them and she paid the instalments fixed by the prospectus to the amount of 10*s*. on every share. In return the infant respondent was placed in possession of something available for herself. But, being an infant, she has now, as she was entitled to do, repudiated her contract to take these shares, with the result that she is no longer liable to pay the instalments which she has not paid, and the question which has to be determined on this appeal is whether, although she has received, and until she repudiated her contract was, like all the other shareholders in this company who took their shares as she did, in possession of something of her own, she is nevertheless entitled to recover back the 250*l*. which she paid.

Now, during that period in respect of which this plaintiff had something available for herself, namely, the shares which were allotted to her and registered in her name, the company was thereby deprived of something of value to itself; it was precluded from allotting those shares to anybody else or from dealing with them in any way; it had disposed of them out and out to the plaintiff and therefore it was prevented from utilizing for its own advantage the shares which stood in her

(1) 10 Bing. 252.

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name, so that during the period of time with which we are concerned the plaintiff was in possession of something and the company was pro tanto in exclusion. It is in these circumstances that we have to ask and answer the question whether this lady who has now repudiated her contract is entitled to have back any money she has paid under it.

Apart from the case before Stirling J. the authorities appear to me to establish that where something has been made available for the infant under the contract in the period during which she has not sought to avoid it moneys paid cannot be recovered back, although on the subsequent repudiation of the contract by the infant all liability in respect of further payments disappears, and I think the cases show that that which must be received by an infant under the contract sufficient to disentitle her to have moneys paid under it repaid need not be much; it must only be tangible; in other words there must have been a total absence of consideration moving from the infant before the infant can succeed in getting back money which she has paid. I think that is shown in *Corpe* v. *Overton* (1), and particularly in the judgment of Bosanquet J. where, dealing with *Holmes* v. *Blogg* (2), and distinguishing *Corpe* v. *Overton* (1) from *Holmes* v. *Blogg* (2), he says that in *Holmes* v. *Blogg* (2) "the infant had paid a sum of money as part of the consideration for a lease of premises in which he carried on business with a partner. The premises were, in fact, occupied for twelve weeks; but if they had been occupied for any other period"—that is to say for any other period however short—"there would have been no difference in principle, and the plaintiff could not recover back sums from the outlay of which he had derived an advantage." Then he goes on to contrast the case before him: "Here, the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed."

I think, therefore, we have here to ask ourselves the question whether, during the period when the plaintiff did not elect to repudiate her contract, the consideration for that contract as between herself and the company had wholly failed. To

(1) 10 Bing. 252, 258. (2) 8 Taunt. 508.

my mind it had not in any sense failed. There was some detriment to the company; and there was substantial consideration being enjoyed by herself, either actual or in possibility, during the whole of the period. She had the tangible advantage of being in a position to sell and transfer, if she had been so minded, her shares for a consideration which would, at least, have been substantial. She might, had she chosen, have attended meetings of the company. In these circumstances I think that the condition imposed upon an infant before she can recover money paid has not been complied with by the respondent. I agree with the Lord Justice in thinking that Stirling J. in that respect did not correctly interpret the earlier authorities which he professes to follow in *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (1) when he said that the question was not (he did not put it in the negative form, but I do so) whether the consideration had wholly failed, but whether the infant had derived any real advantage. I think the question is not: Has the infant derived any real advantage? but the question is: Has the consideration wholly failed? In my judgment in this case the consideration has not wholly failed on either side, and accordingly the action, as my Lord has said, must be dismissed and judgment entered for the defendants.

Appeal allowed.

Solicitors for appellants: *W. J. and E. H. Tremellen, for Emsley & Sons, Leeds.*

Solicitors for respondent: *Corbin, Greener & Cook, for Pullan, Davies & Burrows, Leeds.*

(1) [1894] 3 Ch. 589.

W. I. C.

Considered. BONYTHON *v.* COMMONWEALTH OF AUSTRALIA [1951] A. C. 201

C. A.
1923
RUSSELL J.
Jan. 11, 12.
C. A.
May 29, 30, 31; *July* 31.

In re CHESTERMAN'S TRUSTS.

MOTT *v.* BROWNING.

[1921. C. 3053.]

Administration—Settlement of reversionary Personalty—Death of Tenant for Life—Realization—Fund in Court—German Beneficiaries—English Mortgages of Interests to secure Repayment of Reichsmarks—Repayment in Gold—Application of German Municipal Law—Date of Conversion into English Currency.

In an action brought to administer the trusts of a fund settled by an indenture dated March 23, 1887, an inquiry was ordered whether the persons who had become entitled on the death of the tenant for life, who died on January 19, 1920, to shares of the trust fund, which was represented by a fund in Court, had encumbered their shares. The Master by his certificate, dated November 24, 1922, found that F. S. had not encumbered her share, that Edwin von B. had absolutely assigned his share to one M. B., who, on November 23, 1911, had assigned it by way of mortgage to a Dutch bank to secure the repayment of a sum of German reichsmarks, and that Egon von B. had, on February 12, 1906, also assigned by way of mortgage his share to another Dutch bank to secure the repayment of a sum of German reichsmarks. The Master further found that there were due to the Dutch banks certain sums in German reichsmarks. On further consideration the Court was asked to apportion the mortgage security in the proper proportions between the mortgagors and mortgagees, and it was therefore necessary to convert the sums found due in reichsmarks into English currency. At the date of the execution of the mortgages the creditors could under German law have insisted on payment in gold, but by a German Imperial Statute of August 4, 1914, it was provided that Imperial Treasury notes should be legal tender and that any agreement made before July 31, 1914, for the payment of any debt in gold should, until further order, not be binding on the debtor, and no further order had been made:—

Held, by Russell J. and the Court of Appeal, that the loans were loans of foreign money, involving on the one side an obligation to pay, and on the other side an obligation to accept payment in whatever at the date of repayment was legal tender and legal currency in the foreign country whose money was lent, and that the covenants to pay specified sums in reichsmarks were satisfied under the German law now in force, by the payment in Treasury notes of sums so specified.

British Bank of Foreign Trade v. *Russian Commercial and Industrial Bank* (1921) 38 Times L. R. 65 approved.

Held, also, by Russell J. and the Court of Appeal (Younger L.J. dissenting), that the date for the conversion of the sums of money found due in marks into English currency was the date of the Master's certificate.

Russian Commercial and Industrial Bank v. *British Bank of Foreign Trade* [1921] 2 A. C. 438 applied.

Held, by Younger L.J., on the construction of the mortgages that it was the intention of the parties that no payment of principal or interest should be made until the fund fell in by the death of the tenant for life, on January 19, 1920; that if the proceedings had been by the mortgagees to enforce their securities there would not have been any translation into sterling until that date; that in each case the sum in marks due for principal and interest would have been calculated and translated into sterling as at the exchange of that day and each subsequent instalment down to the date of payment would in like manner have been converted into sterling at the rate of exchange when such payment became due; and that the same principles were applicable to the sums found due by the certificate in the present administration proceedings.

FURTHER consideration of an action to administer the trusts of an indenture dated March 23, 1887, and made between Sarah Chesterman of the first part, John Browning of the second part, Sarah Mary Browning of the third part, Henry Mott and Herbert Angelo Mott of the fourth part, and Fanny Sarah Walewska Wilhelmina Magdalene Ernestine Schimmelpfennig, Edwin Max Ernst Marschall von Bieberstein, and Egon Wilhelm Marschall von Bieberstein of the fifth part.

The following statement of facts is taken from the judgment of Russell J.: "There was a trust deed of March 23, 1887, under which, in certain events, various persons became entitled to the trust fund. The surviving trustee of that trust deed, on July 7, 1921, issued an originating summons. To that he made various persons parties, including three persons who had become entitled to share in the trust fund on the death of certain persons and their assignees or mortgagees. The defendants to that summons included a gentleman named Max Busch and a Dutch company described in the summons as the Algemeene Maatschappij, and a bank described as the Nederlandsche Bank. What was asked by the summons was whether, according to the true construction of the indenture and in the events which had happened, the defendants Fanny Sarah Walewska Wilhelmina Magdalene Ernestine Schimmelpfennig, Edwin Max Hermann Ernst Marschall von Bieberstein and Egon Wilhelm Marschall von Bieberstein were entitled to any and what interest or interests in the trust fund constituted under the indenture. Upon that summons coming before me on January 20, 1922, I declared

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that according to the true construction of the indenture and in the events which had happened, amongst other things, that on the death of Maria Marschall von Bieberstein, which event occurred on January 19, 1920, the defendants, Fanny Sarah Walewska Wilhelmina Magdalene Ernestine Schimmelpfennig, Edwin Max Hermann Ernst Marschall von Bieberstein, Egon Wilhelm Marschall von Bieberstein and their representative assignees and incumbrancers, if any, became entitled to the trust fund in possession, as follows: and certain proportions are set out, the proportions varying slightly among these three people, 'subject to the charge created by the Treaty of Peace Order, 1919.' Then it was ordered that the following enquiries be made: 'An enquiry whether any and which of the defendants Fanny Sarah Walewska Wilhelmina Magdalene Ernestine Schimmelpfennig, Edwin Max Hermann Ernst Marschall von Bieberstein, and Egon Wilhelm Marschall von Bieberstein have in any way and how assigned mortgaged charged or incumbered their respective shares in the trust fund and if so what were the dates and priorities of such assignments mortgages charges or incumbrances respectively and what is the nationality of the persons or companies in whose favour such assignments mortgages charges or incumbrances were respectively made and in whom the said shares in the trust fund or any such assignments mortgages charges or incumbrances are now respectively vested and what is due and to whom in respect of such respective assignments mortgages charges or incumbrances.' And then certain provisions were made as to costs, and it was ordered that upon payment of the costs the plaintiff, that is the trustee, was to be at liberty to lodge in Court the balance of the trust fund in his hands and further consideration of the action was adjourned. Accordingly, the trustee has paid into Court, and there is now in Court, the trust fund in question to which these three persons and their assignees or incumbrancers are, subject to the Peace Treaty Order, entitled. The Master made his certificate, dated November 24, 1922, by which he finds as follows: First, that the defendant, Fanny Sarah Walewska Wilhelmina Magdalene Ernestine Schimmelpfennig has not in

any way assigned mortgaged charged or incumbered her share. So there is no trouble arising regarding her share. He next finds that Edwin Max Hermann Ernst Marschall von Bieberstein assigned absolutely all his share in the said trust fund in the year 1910 to Max Busch, who was one of the defendants to the summons before me. Accordingly Edwin drops out and Max Busch takes his place as the person entitled to the share. The certificate then proceeds: 'By an indenture dated November 23, 1911, the said Max Busch assigned by way of mortgage the said share to the Algemeene Maatschappij to secure the repayment of the sum of 31,000 German reichsmark three calendar months after the date of the death of Maria Marschall von Bieberstein (which event happened on January 19, 1920) with interest thereon at the rate of 7 per cent. per annum (reducible to 6 per cent. on payment within fourteen days next after such half-yearly date of payment) from January 1, 1912.' Then the certificate proceeds to find that the Algemeene Maatschappij is a Dutch company incorporated according to the laws of Holland, and that 'Subject to the said mortgage the share of the said defendant in the trust fund is vested in the defendant Max Busch.' So the position is that Max Busch is the owner of that share. Then the certificate finds that 'there is due to the said Algemeene Maatschappij under and by virtue of the said mortgage the sum of 31,000 German reichsmark in respect of principal together with interest thereon at the rate of 7 per cent. per annum calculated from July 1, 1912, down to the date of payment.' So that the total amount in reichsmark can be easily ascertained. Then the certificate deals with the third share, the share of Egon von Bieberstein, and it finds that Egon von Bieberstein 'by an indenture dated February 12, 1906, assigned by way of mortgage his share in the said trust fund to the defendants the Nederlandsche Bank to secure the repayment of the sum of 33,000 German reichsmark on May 1, 1906, together with compound interest thereon at the rate of 6½ per cent. per annum from the said February 12, 1906, payable half-yearly,' reducible to 6 per cent. on payment within a certain time. Then the certificate

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continues: 'The Nederlandsche Bank is a corporation with limited liability incorporated according to the laws of the Kingdom of Holland and has its registered office at 33 Prinsessegracht The Hague Holland. Subject to the said mortgage the share of the defendant Egon Wilhelm Marschall von Bieberstein in the said trust fund is vested in the said defendant.' Then the certificate contains this finding: 'There is due to the said Nederlandsche Bank under and by virtue of the said mortgage the sum of 33,000 German reichsmark in respect of principal together with compound interest thereon at the rate of 6½ per cent. per annum from the said February 12, 1906, down to the date of payment.' So again, according to the certificate, the amount in reichsmarks due upon that mortgage to the Nederlandsche Bank is a sum easily capable of ascertainment by a simple arithmetical calculation."

The action came on for further consideration before Russell J. on January 11 and 12, 1923.

Underhay for the plaintiff.

Devonshire for Fanny Schimmelpfennig, Edwin von Bieberstein and Egon von Bieberstein.

Gavin T. Simonds for the Attorney-General.

G. B. Hurst K.C. and *H. C. Bischoff* for the two Dutch banks.

R. Peel for Max Busch.

RUSSELL J. This is a further consideration of an action which raises an interesting point. The matter arises in this way [His Lordship stated the facts as above set out and continued:] The action now comes on for further consideration and it is now proposed to divide the fund in Court amongst the persons properly entitled to receive the sums. So far as Egon and Max Busch are concerned their interests are subject to the Peace Treaty charge, but leaving that out of consideration for the moment, what the Court is asked to do in these proceedings is to apportion the mortgage security in each case between the mortgagor and the mortgagee in the correct proportions—that is, the Court has to find the amount

due to the mortgagee under the mortgage, pay him that amount out of the mortgage property, and pay the balance to the mortgagor, or those claiming under him or by virtue of him. The necessity therefore arises of converting the sum in reichsmarks found due under the certificate into English currency. Mr. Hurst, who appears for the two mortgagees, the Algemeene Maatschappij and the Nederlandsche Bank, claims that the debt due under the mortgages was, on the true construction of the documents, a debt payable in gold—that is to say, that the loan was not one in marks but in gold, not by reason of any clause in the deeds themselves, which are accurately described in the schedule as being mortgages to secure sums of German reichsmarks, but because of circumstances which existed at the date of each deed. To make that intelligible I must refer to the evidence of Dr. Schuster, an expert whose evidence has been accepted as accurate by all parties. There is no conflict on this point between him and Dr. Baerwald who has given evidence on behalf of the mortgagees. Dr. Schuster said: "The terms 'reichswahrung' and 'reichsmark' were introduced by the Imperial legislation which, after the formation of the German Empire, substituted an Imperial currency for the currencies of the several states comprised in the empire, more particularly by the statute of July 9, 1873, which by art. 1 provided that an Imperial gold currency was to be substituted for the state currencies and that the mark was to be the 'unit of account.' This rule was maintained in the statute of June 1, 1909, which consolidated the law as to coinage. By s. 1 of the statute of April 30, 1874, relating to the issue of Imperial Treasury notes, the Imperial Chancellor was authorized to issue Imperial Treasury notes, to the extent therein mentioned, and it was provided, by s. 5, that such Imperial Treasury notes should be accepted in accordance with their nominal value"—that means of course their nominal value in marks —"in full discharge of any payments required to be made to any Imperial or State fiscal authority, but that there should be no compulsion to accept them in discharge of

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any payments required to be made in private intercourse. The statute of March 14, 1875, relating to the issue of bank notes provided, by s. 2, that there should be no obligation to accept bank notes in the case of payments required to be made in money, and that such an obligation could not be imposed by State law. As from October 1, 1907 (up to which date certain silver coins were still legal tender), down to the change in the law hereinafter referred to gold coins were, under the effect of the statutes hereinbefore referred to, the only currency recognized as legal tender in Germany in the case of any payment exceeding twenty marks." The result was that down to the later legislation a person to whom a debt was due exceeding twenty marks could not be forced to accept payment otherwise than in gold. Then comes the later legislation: "An Imperial statute of August 4, 1914, provided that until further order Imperial Treasury notes should be legal tender and that neither the Imperial Treasury nor the Imperial Bank should be under any obligation to redeem the notes issued by them respectively, and, by an Ordinance issued by the Federal Council on September 28 (under power conferred by an Imperial statute of August 4, 1914), it was provided that any agreement made before July 31, 1914, for the payment of any debt in gold should until further order not be binding on the debtor. The said statute of August 4, 1914, as well as the said Ordinance of September 28, 1914, was to remain in force until the issue of a repealing order by the Imperial Chancellor." Dr. Schuster states that no such order was issued. "By virtue of the changes in the law brought about by the enactments referred to in para. 4 hereof a covenant or a promise (whenever entered into) for payment of a specified sum in reichsmarks is, according to the rules of German law which are in force at the present time, satisfied by payment in Treasury notes of the sum so specified." Mr. Hurst contends that at the date when the two mortgages were executed—namely, in 1906 and 1911 respectively—the debtor could not have forced the creditor to accept payment otherwise than in gold, and therefore, he says, this is a gold loan. I am unable to accept

that conclusion. This was a loan of foreign money, and it appears to me that I should construe the documents as involving an obligation to repay, and an obligation to accept payment in whatever, at the date of repayment, was legal tender and legal currency in the foreign country whose money was being lent. Mr. Hurst really seeks not to construe reichsmarks as gold reichsmarks but to introduce into the document as a term the provision of German municipal law that the mortgagee shall not be obliged to accept payment except in gold. Let me test it in this way. Suppose the document had been one executed between two German subjects, then it seems to me quite clear that if the mortgagee had sought to enforce payment or the mortgagor had come forward to effect payment in 1920, the mortgagee would have had no right to refuse payment in what I, for convenience, may term paper marks. But, says Mr. Hurst, that may be true in the case of two German subjects both subject to the German municipal law, but I am a Dutch company and no such law can deprive me of my rights under the 1906 document. It appears to me there is a fallacy in that argument, because the right he is insisting on by virtue of the 1906 document is a right which was only conferred upon him by the German municipal law of that date. As a matter of construction the true view is that in such a document the obligation to pay is satisfied by a repayment in whatever may be the legal tender or legal currency at the time of repayment in the foreign country whose money is the subject matter of the loan. Then Mr. Hurst puts the case in another way. He says that even if he is wrong in his first contention yet his claim is in essence one for damages for breach of contract to repay the principal at the date provided by the security, and for failure and breach of contract to pay interest at the date provided in the document for the periodic payment of interest. He referred to and relied on certain authorities to show that in such a case, the claim being for damages for breach of contract, for the purpose of converting the damages from foreign currency into English money you must effect the conversion at the rate of exchange prevailing at the date

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of the breach, and not that at the date of the judgment. I am not going to analyse the authorities nor to consider them in detail. It appears to me that they have no application to the case before the Court. This is in no sense a claim by the mortgagees for damages for breach of contract. They have taken no proceedings of any kind against the mortgagors in personam. Their only claim to receive any share of this fund in Court is on the footing that they seek to have paid to them part of the mortgage security. The shares of the mortgage property to which they are entitled are to be ascertained by reference to the amounts due to them in respect of the mortgages and for that purpose an account has been taken. All that the Court is doing here is dividing the property in the correct proportions between the mortgagors and the mortgagees. This is in no sense an action against the mortgagors on their covenant, and still less is it a claim for damages for breach of contract. The true position is that the Court in dividing the funds ascertains what sums would be payable by the mortgagors if they came to the Court seeking to redeem, and those sums are payable out of the mortgage property to the mortgagees, and the balance to the mortgagors, and those claiming in respect of their titles. Upon that footing it appears to me that the correct date at which the sums of money found due in marks in the certificate is to be converted into English currency is the date of the certificate.

J. B. B. M.

C. A

The Dutch Banks appealed. The appeal was heard on May 29, 30 and 31, 1923.

G. B. Hurst K.C. and *H. C. Bischoff* for the appellant banks. The issue in this case is at what dates the principal and interest due under the mortgages ought to be converted into sterling. On the construction of the mortgages the mortgagors covenanted to pay in gold, and that cannot be affected by subsequent war legislation in Germany. Alternatively it is submitted that the dates for conversion into sterling are the dates when principal and interest actually

became due. The respondents contend that the date is fixed by the certificate of the Master—namely, November 24, 1922. In 1906 and 1911, when these mortgages were executed, the obligation imposed upon the mortgagors by German law was to pay in gold marks, and, notwithstanding the subsequent German legislation, the covenants of the mortgagors could only be satisfied by payment in coin. The rights of creditors could not be affected by that legislation.

As to the second ground of appeal, the whole trend of authority is in favour of taking the date at which the debt became due as the proper time for conversion. *Manners* v. *Pearson & Son* (1) is an exception from the general line of authority; it is limited to actions for an account only. The indebtedness is to be gauged in sterling at the date when it arose, whether on breach of contract, or debt, or in tort: *Cash* v. *Kennion* (2); *Cockerell* v. *Barber* (3); *S.S. Celia* v. *S.S. Volturno* (4); *In re British American Continental Bank. Golzieher and Penso's Claim* (5); *In re British American Continental Bank. Credit General Liegeois' Claim.* (6) There is no ground for excluding the application of the general rule established by these cases.

Gavin T. Simonds for the Attorney-General. It is said that there is a covenant to pay in gold marks. The evidence does not support that view. The unit of payment is regulated by the German municipal law. The obligation is to pay in reichsmarks, and not in gold.

On the second point Russell J. was right in holding that the authorities relied upon by the appellants have no application. Here the Master has certified that a certain sum is due in marks—i.e., the principal sum mentioned in the mortgage together with interest, and at that date the mortgagor was in a position to tender the amount in sterling represented by those marks. Here the same account is necessary as in a redemption action, although the proceedings are taken by the trustee to ascertain how he ought to divide the fund.

(1) [1898] 1 Ch. 581.
(2) (1805) 11 Ves. 314.
(3) (1810) 16 Ves. 461.
(4) [1921] 2 A. C. 544.
(5) [1922] 2 Ch. 575.
(6) [1922] 2 Ch. 589.

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The amount ought to be the same whatever the procedure may be: *Farrer* v. *Lacy, Hartland & Co.* (1); see form of decree in Seton on Judgments and Orders, 6th ed., vol. iii., p. 1828; *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* (2); *Société des Hôtels le Touquet Paris-Plage* v. *Cummings.* (3) *Manners* v. *Pearson & Son* (4) has never been overruled, and the learned judge was bound to follow it. What was said by Lindley M.R. in that case (5) is entirely applicable here.

R. Peel for Max Busch.

Devonshire for Egon von Bieberstein. It is submitted that on the construction of the mortgage not only the accumulated interest but the principal did not become payable till January 19, 1920. If the judgment below be not upheld the mortgagee would be entitled to such a capital sum in English currency as at the rate of exchange ruling on January 19, 1920, is equivalent to 33,000 marks with compound interest thereon (calculated in marks) at the rate of $6\frac{1}{2}$ per cent. per annum from February 12, 1906, to January 19, 1920, with half-yearly rests on May 1 and November 1 in every year commencing on May 1, 1906 (the amount of such capital sum to be verified by affidavit), together with simple interest on such capital sum at the rate aforesaid from January 19, 1920, to the day for payment (less income tax).

Underhay for the trustee took no part in the argument.

G. B. Hurst K.C. in reply. On the evidence of the German lawyers the covenant to pay was in the view of German municipal law a covenant to pay in gold coins.

Assuming, however, I am wrong on this point, then having regard to the form of the inquiry directed it is clear on the mortgages that the amounts became due to the mortgagees at different times. The Master in his certificate never attempted to adjudicate on the question now argued. The date of the breach is the date at which the damages are to be ascertained, and therefore where there are a number of

(1) (1885) 31 Ch. D. 42.
(2) [1921] 2 A. C. 438.
(3) [1922] 1 K. B. 451.
(4) [1898] 1 Ch. 581.
(5) Ibid. 585.

breaches they cannot be lumped together for the purpose of ascertaining the amount of the damages and then that amount translated into the appropriate currency.

The dates to take are the dates at which the amounts respectively became due. There is no difference in principle between a debt and damages for breach of contract. It would be wrong therefore to apply a different rule.

I rely on *In re British American Continental Bank. Credit General Liegeois' Claim* (1) and *Manners* v. *Pearson & Son.* (2)

Cur. adv. vult.

1923. July 31. The following judgments were delivered.

LORD STERNDALE M.R. This is an appeal from Russell J. raising a question as to the amount to which certain mortgagees of reversionary interests in a fund are entitled on the distribution of the fund. The facts are clearly stated in the judgment of the learned judge. [The Master of the Rolls read the statement of the facts from the judgment of Russell J. above set out and continued :]

The learned judge has held that the amount which the mortgagees are entitled to be paid out of the fund is the amount in marks due on the mortgage for principal and interest converted into sterling at the rate of exchange prevailing at the date of the certificate. This, of course, gives the mortgagees an absurdly small sum : in the one case 1*l.* 15*s.* 1*d.*, and in the other 3*l.* 2*s.* 3*d.*

The mortgagees appeal, and the first point taken on their behalf is that by the terms of the mortgages themselves they are entitled to be paid in what they call gold marks, in other words, that the mortgages are given to secure not so many reichsmarks but so many gold reichsmarks. In my opinion this contention is not correct. A reichsmark is what is called a unit of account—that is, a coin which had a definite value throughout the German Reich and was substituted for the different coinages existing at the formation of the German Empire in the different States included in it.

(1) [1922] 2 Ch. 589. (2) [1898] 1 Ch. 581.

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Strictly speaking, there is no such thing as a gold mark. There are gold coins of a certain number of marks, but a gold mark does not exist. The appellants' contention really amounts to this: that in these mortgages reichsmarks are to be read not as units of account but coins of one-tenth the value of the gold coin. I do not think this is correct. By the law of December 4, 1871, the following provisions are made as to a gold coinage: Imperial gold coin are coins at the rate of 139½ coins to one pound of fine gold; the tenth part of such gold coin is called a mark, and is divided into 100 pfenninge. I think that a mortgage to secure a given number of reichsmarks is a mortgage to secure the repayment of whatever may be legal tender at the time of repayment in the country where the reichsmark circulates. Up to August, 1914, for a debt of this kind the German law required a tender to an amount above 20 marks to be in gold in order to be legal tender, and the appellants argue that because at the time of the loan a payment of 31,000 or 33,000 marks could only be made in gold the document must be construed as a loan of marks payable in gold. I think there is a fallacy in this. If the appellants call in aid the German municipal law for the purpose of ascertaining what is a legal tender it must be the German municipal law for the time being—that is, at the time of payment—and the state of that law at the time of the loan is immaterial. If the German law is to have any relevancy it must be the German law as it is from time to time, and the mortgagees cannot take that law as it exists at one time and claim that their rights must be regulated by its then state however it may be changed in the future. In other words, if their rights are to be defined by German law it must be that law as it exists from time to time. I do not think that the ordinance of September, 1914, has any bearing on this case, because in my opinion this was not an agreement in accordance with which a payment in gold had to be made.

The appellants, however, raise another point, that is, that assuming this was not a mortgage of gold marks and that the mortgagees were at liberty to pay in Treasury notes or paper

marks, still if for any purpose the amount of paper marks payable has to be converted into sterling it must be so converted as at the date when payment had to be made according to the mortgage deed, which they allege to be considerably earlier than the date of the certificate. This contention is founded on the principle according to which the date of conversion of a sum awarded for damages for breach of contract has been held to be the date of the breach. This principle the appellants contend applies to the case of non-payment of a debt, the difference in exchange being given as damages for not paying on the due date. I have some doubt whether this principle applies at all to a case in which by the terms of the contract the payee agrees that he shall be compensated for the non-payment by interest, but I will assume that if the mortgagees had in this case brought an action on the covenant in the mortgage to recover the money the principle would have applied. But no such action was brought. What took place was that, it becoming necessary to ascertain what sum was due on the mortgage, an inquiry for that purpose was directed and took place. That sum is ascertained, as it must be, in marks, and on payment of that sum in marks the mortgagor would be entitled to redeem the security. If after the ascertainment of the amount the mortgagor tendered the amount in marks I cannot see how the mortgagee could have refused it. This is perhaps plainer in the mortgage, which makes the money payable to an agent of the mortgagee in Berlin, but I do not rely on that circumstance. In this case the mortgagor does not pay the money himself, but it is paid out of a sum which is standing to the credit of an account in a Court in this country. I cannot see how that circumstance can entitle the mortgagee to be paid more than he would get if there were no fund, nor can I see how the amount payable upon the mortgage can depend upon the position of the fund or the situation of the country in whose Court it stands.

I think the decision of Russell J. was right and the appeal should be dismissed with costs.

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WARRINGTON L.J. An English trust fund is represented by a fund in Court. Two of the persons entitled, subject to a life interest, to shares in that fund being Germans, borrowed from Dutch banks certain sums in Imperial German marks, and executed mortgages of their respective shares to secure the repayment of those sums respectively with interest thereon. The tenant for life having died, the fund became distributable, and it became necessary to ascertain what proportion thereof was payable to the mortgagees of the two shares, and accordingly an inquiry was directed as to the incumbrances thereon, and "What is due and to whom in respect of such incumbrances." In answer to this inquiry the Master has found that in each case there is due to the mortgagee a certain sum of German reichsmarks with interest at the rates and from the days in the certificate mentioned. The certificate, which was dated November 24, 1922, and was filed the same day, having become binding the matter came on for further consideration, and the question necessarily arose on what principle and at what date were the sums in sterling representing the sums of marks mentioned in the certificate to be ascertained. The judge has made an order directing payment to each mortgagee of such sum in sterling as at the date of the certificate represented the value of the German reichsmarks found due under and by virtue of the mortgage with the interest thereon. Under this order the mortgagees would receive in satisfaction of their respective mortgages very small sums of English money, and they appeal therefrom, insisting either that the amount payable to them should be the equivalent of German reichsmarks payable in gold, or if they fail in this, then that the rate of exchange should be that ruling on the days when the respective sums became payable by virtue of the personal obligations contained in the mortgages respectively. Having thus stated in general terms the nature of the question and how it arises I must now go a little more into detail.

The fund was settled by a trust deed executed in the year 1887, under which a lady, who died on January 19, 1920, was entitled to the income for her life. It has been determined

in the action that, subject to her life interest, the fund was divisible into shares of which Edwin Max Hermann Ernst Marschall von Bieberstein and Egon Wilhelm Marschall von Bieberstein respectively became entitled to 97/282. In 1910 Edwin assigned his share to one Max Busch, and by an indenture dated November 23, 1911, Busch assigned such share to a Dutch bank to secure the repayment of a sum of 31,000 German reichsmarks advanced to Busch by the bank. The deed was in the ordinary form adopted in such cases. It contained a covenant by the mortgagor for payment of the 31,000 German reichsmarks at the expiration of three calendar months from the death of the tenant for life—that is to say, on April 19, 1920—with interest thereon from January 1, 1912, at 7 per cent. per annum (reducible to 6 per cent. on punctual payment) by equal half-yearly payments on January 1 and July 1 in each year. The share was assigned to the mortgagees subject to a proviso for redemption on payment of 31,000 German reichsmarks with interest in accordance with the covenant, and any other sums by the deed made payable and not then paid. The deed contained a provision that the security should be deemed to be an English instrument and be enforceable according to the law of England for the time being in force with respect to securities. By a deed dated February 12, 1906, Egon assigned his share to another Dutch bank by way of mortgage to secure the repayment of 33,000 German reichsmarks with compound interest as therein expressed. The deed contained a covenant to pay 33,000 German reichsmarks on May 1, 1906, with interest at 6½ per cent. per annum from the date of the deed, and if the money was not so paid then to pay to the mortgagees interest at the same rate by half-yearly payments on May 1 and November 1 in every year. The deed contained an assignment of the share and of a policy of assurance on the life of the mortgagor subject to a proviso for redemption in common form on payment of 33,000 German reichsmarks with interest thereon. The deed contained provisions for the conversion of unpaid interest into principal and the accumulation thereof by way of compound interest

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with half-yearly rests and a covenant in the following terms: "The borrower will when the said share and premises fall into possession pay to the mortgagee the said accumulated fund as well as the original principal sums hereby secured together with interest thereon respectively at the rate aforesaid until payment and such fund and sum and the interest thereon shall constitute a charge on the premises hereby assigned, and the premises hereby assigned shall not be redeemed except on payment of all principal moneys hereby secured and all interest and accumulations made as aforesaid of interest on such principal money and accumulations." It was thereby agreed that the deed should take effect and be construed in all respects in accordance with the law of England. No interest was ever paid under either of the deeds. As to the mortgage of Edwin's share the principal money became due on April 19, 1920, and each payment of interest became due on the half-yearly day fixed for payment. On the true construction of the mortgage of Egon's share I think the only covenant for payment either of principal or interest which in the events which happened became operative was that set out above, and accordingly the original principal and the accumulated interest became due on January 19, 1920, and was payable with further accumulations of interest until the date of payment. This point becomes important only if this Court should be of opinion that the principle and date of conversion adopted by Russell J. is not correct.

The appellants object to the order appealed from on two grounds. First, they say that on the construction of each of the deeds the sum of German reichsmarks thereby secured was payable in gold only, and accordingly that the sum in sterling to which each of them is entitled is the sum equivalent to the number of gold marks payable under the deed. Secondly, if their first contention fails, they contend that their claim, being in law a claim for damages for breach of contract, the proper date for making the conversion is that of the breach—that is to say, the several dates on which the principal and each payment of interest respectively became due.

As to the first contention neither of the deeds provides in express terms in what form the payment shall be made; the debtor in each case simply undertakes to pay so many German reichsmarks. According to the evidence the reichsmark is simply the unit of account in the Imperial German currency established in 1873 to take the place of the various State currencies previously existing. It seems to me, therefore, that an obligation to pay so many German reichsmarks is simply one to pay so many units of German currency. The form in which such a payment is to be made must in my opinion be regulated by German municipal law, and what would or would not be a legal tender must depend upon the law on that subject in force at the time of the tender. The result of the evidence on this subject is that from October 1, 1907, down to August 4, 1914, gold coins were the only currency recognized as legal tender in Germany in the case of any payment exceeding 20 marks. The exact terms of the law of June 1, 1909, a copy and translation of which have been furnished to us as being the statute referred to by Dr. Ernest Schuster (and which I gather is of the nature of a consolidation Act) are: "No one is obliged to take in payment silver coins to an amount of more than 20 marks, nickel and copper coins to an amount of more than one mark." Prior to August 4, 1914, in private dealings there was no obligation to accept either Imperial Treasury notes or banknotes in payment: see the law of April 30, 1874, as to Treasury notes and that of March 14, 1875, as to banknotes. Since August 4, 1914, Imperial Treasury notes have been legal tender.

The appellants in this state of facts contend that at the date of the respective contracts they would have been entitled to insist on payment in gold and therefore they are now entitled to insist on payment in that form. But if I am right in thinking, as I do, that the obligation is merely to pay in German currency, the nature of that currency must necessarily be regulated by German law, which thus becomes for this purpose a part of the "proper law of the contract"—to use the term adopted by Professor Dicey (Dicey Keith's Conflict of Laws, 3rd ed., p. 615). In fact the

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contention with which I am now dealing can only be supported by treating as part of the law of the contract the provisions of German law as to legal tender. This law is necessarily subject to alteration from time to time according to the economic needs of the country and the will of the German Legislature, and has in fact been altered in the manner above mentioned. The appellants cannot, in my opinion, rely on German law for one purpose only and refuse to submit to its liability to alteration by the competent authority.

In my opinion, therefore, the contracts in question are not contracts the obligations under which can only be discharged by payment in gold.

This view of the nature of the contracts is substantially the same as that expressed by Russell J. in *British Bank for Foreign Trade* v. *Russian Commercial and Industrial Bank* (1), and I think that that case as well as the present was in that respect rightly decided. In the view I take of the true construction of the contract the Ordinance of September 28, 1914, referred to by Dr. Schuster, does not affect the present question. It may be that if according to its true construction a contract were one for payment in gold, as, for example, if it had been so expressed, that Ordinance would have had no operation to prevent an English contract of that nature from being binding on the debtor, but that is not the case with which we have to deal.

As to the second point, that is to say, that conversion ought to be made as at the date when the several moneys became due, I will assume that if the subject of the discussion were the amount in sterling for which personal judgment against the debtor ought to be pronounced the date fixed for payment according to the contract would be the correct date. In the ordinary case of damages for breach of contract it is settled that conversion must be made as at the date of the breach: *Di Ferdinando* v. *Simon, Smits & Co.* (2); *S.S. Celia* v. *S.S. Volturno* (3); and *Goldzieher and Penso's Claim.* (4) The same principle has been applied when the

(1) 38 Times L. R. 65.
(2) [1920] 3 K. B. 409.
(3) [1921] 2 A. C. 544.
(4) [1922] 2 Ch. 575.

breach is non-payment of a debt at the time it became due: *Credit General Liegeois' Claim* (1); and see also the judgment of Vaughan Williams L.J. in *Manners* v. *Pearson & Son.* (2) There may be a difficulty in treating non-payment of a debt as giving rise to a claim for damages where, as in the present case, non-payment on the due date is under the contract compensated for by payment of interest, but I will assume that the general principle above referred to would apply. But we have not to consider in the present case for what amount personal judgment would be recovered. The question before us is how much of the fund representing the mortgaged property is to be paid to the mortgagee in order to entitle the mortgagor to redeem. Supposing as soon as the amount due had been ascertained by the certificate the mortgagor had paid or tendered that sum in marks he would have been entitled to require a release of the mortgaged property. The price of those marks if he had bought them in the market would have been determined by the rate of exchange on the day of the date of the certificate, and I think that date has been rightly selected by the learned judge as the date for conversion, being that on which the amount due was finally ascertained. The case is not unlike that of a stock mortgage under which the mortgagor had to replace a sum of stock and the mortgagee took the chance of a rise or fall in price. The view I have expressed seems to me to be in accordance with those of the Court of Appeal and of the House of Lords in *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade.* (3) I think it is reasonably clear that so soon as the loan was declared to be a rouble loan the Court of Appeal and the House of Lords regarded the security as redeemable in roubles. See particularly the passage from the speech of Lord Dunedin, p. 448, and a similar passage on p. 449, and one from the speech of Lord Sumner at p. 451. See also the judgment of Russell J. in *British Bank for Foreign Trade* v. *Russian Commercial and Industrial Bank* (4), being the redemption action brought by the

(1) [1922] 2 Ch. 589.
(2) [1898] 1 Ch. 581, 592.
(3) [1921] 2 A. C. 438.
(4) 38 Times L. R. 65.

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mortgagors in consequence of the decision that the loan in question was a rouble loan.

On the whole I agree with the decision of Russell J., and am of opinion that the appeal should be dismissed.

YOUNGER L.J. I will appropriate the benefit, if I may, of the very full statement of the facts and circumstances of this case just made by my Lord and the Lord Justice and will proceed at once to indicate the view I take of the two questions which now arise for our decision. The considerations attending the first of these—that is to say, the question whether upon the true construction of these two mortgage deeds the loans which were made in gold are also repayable in gold—may, I think, be thus stated. The mortgages are each of them mortgages of a reversionary interest in personalty settled by an English trust deed and vested in an English trustee. Each mortgage contains a provision not identical in terms but similar in effect—I quote the clause from the Busch mortgage—that the security shall be deemed to be an English instrument and be construed and be enforceable according to the law of England for the time being in force with regard to securities. The advance in each case is expressed to be an advance of German reichsmarks. The repayment is to be made in German reichsmarks. A reichsmark at the date of each deed was a unit of German currency. It was, however, also the tenth part of a German Imperial gold coin, coined at the rate of 139½ coins from one pound of fine gold: see the law of December 4, 1871. At the dates of these deeds 31,000 reichsmarks in one case and 33,000 in the other were and meant the same thing, whether the reichsmark was regarded as a unit of German currency or as the tenth part of the German Imperial gold coin referred to. The first question, as I see it, accordingly is, whether in these mortgages, construed as they are to be by the law of England, the obligation is to repay the loan in gold coins, or is, in the language of the learned judge, merely to repay "in whatever may be the legal tender or legal currency at the time of repayment in the foreign country whose money is the subject

matter of the loan." The appellant banks, of course, contend for the first alternative, and I would observe at the outset that it is in no way necessary for them, as I understand their position, to invoke German municipal law at any stage of their case for the purpose of determining their rights. What each bank says, as I understand the argument, is that upon its true construction the covenant in its mortgage deed is a covenant to pay in gold coins. There is nothing in English law to make such a covenant unenforceable. There is no difficulty, even to-day, in translating that obligation into English currency. Neither bank, as I understand its position, disputes that even so construed the obligation on the part of the borrower to repay in gold could not now be enforced in Germany. But that, they both say, is only because of the German Ordinance of September 28, 1914, which enacts that agreements made before July 31, 1914, according to which a payment in gold has to be made, are until further order not binding, and such an Ordinance has no operation in England on a covenant governed by English law and set up in an English Court. The position of the banks accordingly is that in the case of each mortgage there is a covenant to make payment in gold from which the mortgagor by English law and in an English Court has never been released and by which according to the law of the contract he remains bound

Now my own view is that at least up to a point this statement of the position of the appellant banks is sound. It does not expose them, as I understand it, to the damaging criticism that to maintain it they are driven to resort to some provisions of German law in order to create a liability in their mortgagor and are compelled to ignore others which would release him from it. To maintain their position they need resort to Germany and its statute laws for one purpose only, and that is to ascertain what it was with reference to which as a mere matter of construction of the deeds the parties to them were contracting about. Now if it be correct so to state the problem, then it becomes one, the solution of which is, to my mind, by no means easy or clear. On the one hand I can myself have very little doubt that neither the borrowers

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nor the banks ever contemplated that repayment would or could be validly made under the deeds otherwise than in gold. This, I think, may even be assumed. But that assumption does not solve the difficulty. Why did the parties make it? Again, I should say, the answer is plain. They made it because neither of them ever supposed that for the duration of the loan there would be any divergence between a reichsmark as a unit of currency, and a reichsmark as the tenth part of an Imperial gold coin. I cannot doubt that if any such divergence—even any slight divergence—between the two had been foreseen the obligation to repay each loan in the gold in which it was made would have been express. But this is not enough for the banks, if the language used is not apt to make that obligation clear. Is, then, that language sufficient for the purpose? On the whole, although not without hesitation, I have come to the conclusion that it is not.

In the case of the Busch mortgage it is provided that all moneys payable under the security are to be paid to a nominee of the lender bank. The first nominee is given in the deed, and he has an address at Berlin. In the case of this mortgage, therefore, the fact that repayment in Germany and not in Holland was contemplated actually appears on the face of the deed—a circumstance which to my mind indicates that any repayment proper and sufficient by German law at the time when in Germany it was made was in the direct contemplation of the parties. Egon von Bieberstein's mortgage does not provide any similar direct indication of intention, but the effect of the deed must, I think, in this respect be in common with the other the same. The mortgagors in each instance were German. In each case, although borrowing from Dutch lenders, they had received their advance in marks—that is, in the coinage of their own country. The natural inference from the fact that the obligation to repay is expressed in the same coinage, although the security for its performance is an English trust fund, must I think be, in the absence of compelling words to the contrary, that in that obligation the marks are referred to as currency of the country of their issue and nothing else. I confess that I

reach this conclusion with hesitation and some regret. If the contingency which has arisen had even been remotely apprehended, it would, I cannot doubt, have been provided for and the borrowers would have been required, and would have been willing, to repay the equivalent of the sum they had received. In one case the borrower received the equivalent in English currency of over 1600*l.*, in the other as much as 1550*l.* Large sums by way of interest are unpaid on both securities, yet as a result of the learned judge's declaration all liability under the mortgage with arrears of interest from its date will be satisfied by in one case a payment of 3*l.* 2*s.* 3*d.* and in the other by a payment of 1*l.* 15*s.* 1*d.* The result is almost farcical. This must, however, be borne by the lenders, however unfortunate it is, unless some slight alleviation is secured for them by the adoption as correct of their alternative ground of appeal.

That alternative raises the second question before us—namely, the date as at which the sums in marks payable to the banks under their securities are to be translated into sterling so as to fix the sums receivable by them out of the shares in the English trust fund on which their loans are respectively secured. In the present case this question subdivides itself into two: First, what would be the date of such translation if in these proceedings each bank was pursuing its remedies as mortgagee and the Court was in its judgment expressing in English currency the sum due to it? Secondly, is the date of translation altered by the nature of the present proceedings? The first of these questions raises considerations of much interest on some of which judicial opinion apparently still fluctuates, although up to a point the law has been clearly settled by the House of Lords. Whether the claim of a plaintiff be damages for a tort, which have been ascertained in a foreign currency, or damages for a breach of contract similarly ascertained, or be a claim in respect of an obligation to make a payment in or to hand over foreign currency at a fixed date, the necessary, if not the only, reason for an English Court in its formal judgment translating the amount of foreign currency into English

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money is to comply with the requirements of English law that an English judgment for money must be expressed in terms of English currency in order to make the judgment one on which execution can issue. In that state of things one might well share the view, if one were at liberty judicially to entertain it, that when any sum ascertained in foreign currency has under the Court's order to be paid in English sterling, the payment should always be for that sum in sterling which would at the date of the order enable the plaintiff to purchase the foreign currency of the ascertained amount. Thus would there be secured to him the nearest equivalent for that which the Court would give him if it could—that which presumably a Court of the country of the coinage would have done for him had he sued in such a Court—namely, a payment expressed in the terms of the foreign currency he has proved to be recoverable. For where a defendant's obligations, whether in respect of tort, breach of contract, or debt, are, all through, expressible in terms of British currency our Courts have no regard in assessing the amount recoverable by a plaintiff to any variation in the purchasing power of the sovereign between, for example, the date of the breach of contract and the date of the judgment in respect of it. One might accordingly have thought that in relation to a commodity of such limited utility as foreign currency the Courts here might for translation purposes have been equally oblivious to any fluctuation in its internal exchangeable value and might have proclaimed in all these cases its sole purpose to be to give to a plaintiff the nearest possible equivalent in English sterling for that amount of foreign currency to which at that moment it held him entitled, and not to give him a sum in English currency which in these days of violent fluctuations in external values of foreign currency would probably be very much more, might be less, but could only by accident be an equivalent of that amount. And this appears to be the American view. But it is not the law of this country. It has now been definitely decided that certainly in cases both of damages for breach of contract and of damages for tort, the translation must be effected as at the date of the

breach or of the wrong, the principle being most clearly stated, I think, by Lord Sumner in the *Volturno Case* (1), where, speaking of the cost of repairs to a ship damaged in collision and paid in foreign currencies, he says: "In each case these currencies would have been converted into sterling, as at the date when liability for the several outlays accrued, because, when the damage is proved by the actual cost of repairing it, conversion of that cost forthwith into the currency with which the High Court deals is simply the process of completing that proof." Lord Wrenbury in the same case expresses the same view under another figure. The foreign currency to which by way of damages the plaintiff is entitled is a commodity which ought to have been handed to him at the date when the damage was done. The case is the same accordingly as if the plaintiff by the defendant's tort had lost a cow at the same time. In each case the plaintiff recovers by the judgment the value of the currency or of the cow as at that date. These two judgments seem to me very clearly to show that the translation of currency into sterling as at the date of the breach or of the tort is in no way referable to the fact that the claim in each case is in damages and that this translation is by way of further damage. If the exchange were to fall before the date of the judgment there would be a loss for the plaintiff in fixing the earlier date for the translation. But does this same principle apply where the claim as here is for payment of a number of marks which by the debtor's covenant ought to have been paid, but were not, at dates long past? And first of all is an obligation to make payments in foreign currency under a contract which is to be construed and governed by English law, as is the case here, an obligation which results in a debt strictly so-called at all? Is it technically more than an obligation to deliver particular quantities of a prescribed commodity at prescribed dates, and is failure to deliver in an English Court more than a breach of contract to deliver, as was the case in *In re British-American Continental Bank. Lisser and Rosenkrantz's Claim?* (2) If this be the true view

(1) [1921] 2 A. C. 544, 554. (2) [1923] 1 Ch. 276.

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of these deeds here, and it seems to derive support from the speeches of the noble Lords above referred to, it is clear that the value of the marks not delivered at each prescribed date must be ascertained by translation into English currency at that date. It is clear also from the case last cited that the obligant—I use a neutral term—could not in such a case satisfy his obligation by tendering the prescribed number of marks at a date when their value had depreciated.

Now I feel very much impressed with this view of the position, but it was not canvassed in argument, and accordingly I refrain from expressing any concluded opinion upon it, the more especially as it seems to me that the same conclusion may be reached in another way. In my judgment, on the principle of the authorities as they now stand, the same consequence follows even if the obligations of the borrowers under these mortgages are the obligations of debtors, and the sums payable by them in marks are in an English Court and under these English deeds debts. Even on that hypothesis the marks due and not paid must, I think, in each case be translated into English currency at the respective dates when they ought to have been paid and were not. This principle is, I think, involved in the judgments of all the members of the Court in *Manners* v. *Pearson & Son* (1), as explained in the *Volturno Case* (2), and it is expressly so laid down in the dissenting judgment of Vaughan Williams L.J., a judgment which, after the *Volturno Case* (2), must, in all Courts, be regarded as one of the highest authority. It was adopted by Avory J. in the *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* (3), and on the hypothesis on which he proceeded the correctness of his view was, I think, accepted in the Court of Appeal, by at least Bankes and Scrutton L.JJ., and it was also adopted the other day by Rowlatt J. in *Uellendahl* v. *Pankhurst, Wright & Co.* (4), not following a decision of Acton J. in *Cohn* v. *Boulken* (5) to the opposite effect. And for myself I cannot see why on

(1) [1898] 1 Ch. 581.
(2) [1921] 2 A. C. 544.
(3) [1921] 3 K. B. 459.
(4) [1923] W. N. 224.
(5) (1920) 36 Times L. R. 767.

the principle on which such cases as the *Volturno Case* (1) proceeded there should be any real difference for this purpose of fixing the date of translation between a failure to make payment of marks when due under a contract of loan and a failure to hand them over by way of compensation for a wrong. It is said, however, that a distinction may arise from the fact that in the case of a debt in foreign currency it is always open to the debtor to tender to his creditor in payment and satisfaction the precise amount unpaid, and the decision of this Court in *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* (2) is cited in support of that view. I would, however, observe first with reference to that case that the contract there under which the francs became payable was in every sense a French contract, and the payment made in France was by French law a complete satisfaction. French law takes no more account of fluctuations in the franc in relation to French claims than do the English Courts of fluctuations in sterling. The mind of the Court was not in that case directed to English contracts, with which we are here concerned. *Lisser and Rosenkranz's Claim* (3) is nearer the present case even on this view of it. Moreover, in this case no payment or tender whatever of marks has been made to the banks, and the Court has proceeded to an order, and as was indicated by the Court of Appeal in the *Le Touquet Paris-Plage Case* (2), any such tender as was there made would, even in respect of that French contract, have been nugatory after an English judgment for the debt. For these reasons my own view is that even if such a privilege does to any extent belong to the mortgagors under these deeds its existence is not enough to displace the application to them of the principles with reference to the translation of foreign currency into sterling which obtain in actions for breach of contract or in tort.

In my judgment, therefore, if the banks were in these proceedings pursuing their remedies as mortgagees, their right under these deeds would be to have the sum in marks found

(1) [1921] 2 A. C. 544. (2) [1922] 1 K. B. 451, 465.
(3) [1923] 1 Ch. 276.

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to be due to them respectively translated into currency as at the dates when the marks constituting in each case the aggregate sum became due and were unpaid. What then are these dates? Now each mortgage is a mortgage of a reversionary interest. No interest has in the case of either been paid since the loan was made, nor was any payment of principal demanded. Moreover it is in my judgment plain upon the Egon mortgage and it may be implied upon the Busch mortgage, that no payment certainly of principal, and I am prepared to hold no payment of interest, was to be expected until the fund fell in by the death of the tenant for life, which event took place on January 19, 1920. In my judgment, therefore, there would not, in these cases in proceedings to enforce these securities, be any translation of marks into sterling until that date; in each case the sum in marks due for principal and interest as at that date would be calculated and translated into sterling as at the exchange of that day and each subsequent instalment of interest down to the date of payment would in like manner be converted into sterling at the rate of exchange ruling at the date when such payment became due.

And this brings me to the last point. It is said that no such translation is allowable in these proceedings because they are in no true sense proceedings by mortgagees to enforce their securities. "All that the Court is doing here," says the learned judge, "is dividing the property in the correct proportions between the mortgagors and the mortgagees. This is in no sense an action against the mortgagors on their covenant, and still less is it a claim for damages for breach of contract. The true position is that the Court, in dividing the funds, ascertains what sums would be payable by the mortgagors if they came to the Court seeking to redeem, and those sums are payable out of the mortgaged property to the mortgagees and the balance to the mortgagors." I should, speaking for myself, be sorry to feel compelled to subscribe to that position. It seems to me to sanction in this case what Vaughan Williams L.J. in *Manners* v. *Pearson & Son* (1)

(1) [1898] 1 Ch. 581, 595.

uttered his warning against: "Making the plaintiff's remedy for the recovery of what is due to him differ according to the form of procedure and according as he brings his action in the Queen's Bench Division or in the Chancery Division." It is true this is not a foreclosure action. Neither, however, is it a redemption action. Neither the mortgagors nor the mortgagees are actors in it. Both are respondents to a summons by the trustee in which inquiries have been directed such as would more usually have been made on a petition by the banks for payment out of the money due to them. It seems to me that the amount actually in sterling found to be due to the mortgagees must be the same whether it is ascertained on an inquiry directed in a redemption action or in a foreclosure action—on an inquiry directed on such a petition or on one asked for by the trustee of the fund with mortgagors and mortgagees before the Court as respondents, each making their claims. If the sum in sterling found due by them would be ascertained on the principles which I have set out as being in my judgment correct, then in my opinion it must follow that that sum neither more nor less must be found on the inquiries directed in these proceedings.

In my judgment, therefore, these appeals should be allowed, and the order made by the learned judge on further consideration varied by altering the payment schedule so as to give effect to the translations into currency above indicated and by ordering payment in accordance with the schedule as altered.

Appeal dismissed.

Solicitors: *Cruesemann & Rouse; Golding, Hargrove & Golding; De La Chapelle & Co.; Treasury Solicitor; Mott & Son.*

W. I. C.

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1923
P. O. LAWRENCE J.
Feb. 2.
C. A.
May 29.

ELLIS AND SONS, LIMITED *v.* POGSON.

[1921. E. 2089.]

Patent—Action to restrain Threats—Threat of legal Proceedings or Liability in Respect of Infringement of "the" Patent—Person claiming to have an Interest in a Patent—Threat by Applicant for a Patent—No Patent existing at Time of Threat—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29, *ss.* 10, 36—*Patents and Designs Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 80), *s.* 20.

Upon its true construction, s. 36 of the Patents and Designs Act, 1907, as amended by s. 20 of the Patents and Designs Act, 1919, presupposes the existence of a patent, in respect of whose infringement legal proceedings are threatened; so that a threat by a person who has applied for a patent and whose complete specification has been accepted, but to whom a patent has not at the time of making the threat been granted, and is ultimately refused, is not a threat within the meaning of that section in respect of which a remedy is provided:—

So *held* by the Court of Appeal, affirming the decision of P. O. Lawrence J.

Witness Action.

The plaintiffs were a company formed in May, 1921, for the purpose of carrying on business in London as manufacturers and vendors of needles known as "Ladd Knit," an invention for repairing faults or "ladders" in stockings, and in respect of which invention they had applied for a patent. This action was brought by the plaintiffs for an injunction to restrain the defendant from threatening the plaintiffs or their customers with legal proceedings or liability in respect of any alleged infringement of a patent and in particular from continuing to threaten the plaintiffs' customers with legal proceedings if the customers should sell or offer for sale or use needles of the plaintiffs' manufacture or merchandise known as "Ladd Knit" needles and damages.

The following facts were held by P. O. Lawrence J. to have been proved at the trial: On January 18, 1921, the defendant Pogson applied for letters patent for "an improved method of repairing knitted goods." His complete specification was left on February 3, 1921, and was accepted on September 15, 1921. Objections were lodged on the part of the plaintiffs,

and on November 21, 1921, proceedings were commenced to oppose the grant of letters patent to the defendant. In these circumstances the defendant Pogson, on November 28, 1921, called upon the firm of Messrs. Olney, Amsden and Sons, Ld., who under an exclusive licence from the plaintiffs were selling the plaintiffs' goods, consisting of needles for repairing knitted fabrics, which were being sold as "Ladd Knit" needles, and had an interview, first with Mr. King, the sales manager, and later with Mr. Henry Amsden, the managing director of that firm. Pogson at that interview told Mr. King that the "Ladd Knit" needles which Messrs. Olney, Amsden and Sons, Ld., were selling were infringing his patent, and that he would take proceedings to stop the sale; also, he offered to sell his patent for 10,000*l*. The defendant did not tell either Mr. King or Mr. Amsden that the patent had not been granted, nor did he tell them that the patent was being opposed. In short, Mr. Pogson threatened Messrs. Olney, Amsden and Sons, Ld., both with legal proceedings and with liability in respect of an alleged infringement of his patent. The opposition proceedings brought on behalf of the plaintiffs came to a head on March 24, 1922, and the grant of the patent was then finally refused. Therefore, as a matter of fact, there never was nor could there be any patent in existence in respect of the invention of Mr. Pogson in respect of which he threatened proceedings or liability against Messrs. Olney, Amsden and Sons, Ld. The result of those threats was to cause damage to the plaintiffs, inasmuch as Messrs. Olney, Amsden and Sons, Ld., stopped the sale, returned some of the goods and cancelled orders; and the sale of "Ladd Knit" needles was, in consequence of the threats, stopped for at least two months.

It having been decided on the evidence adduced at the trial that the threats complained of were in fact made by the defendant, the question of law was argued as to whether the threat was one which, in the circumstances, came within the mischief aimed at by s. 36 of the Patents and Designs Act, 1907, as amended by the later Act of 1919. (1)

(1) Sect. 36 of the Patents and Designs Act, 1907: "Where any

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The action was heard before P. O. Lawrence J. on February 2, 1923.

James Whitehead for the plaintiff. Under the Patents and Designs Act, 1907, it was not essential that the defendant should have been granted a patent. Lord Cozens-Hardy M.R., in *Diamond Coal Cutter Co.* v. *Mining Appliances Co.* (1) was of opinion that if the exclusive licensees of the patent, who were threatening, had been claiming to be patentees, they might have been within the section. The amending Act of 1919 was passed with the objects first, to bring within the scope of the section the threatener who, although he has no patent, claims that his patent is being threatened: by the amendment he is a person claiming an interest in a patent; and secondly, in the case where a patent has been granted, to enlarge the scope of the original section, so as to include within the mischief aimed at, the threat of an exclusive licensee: *Diamond Coal Cutter Co.* v. *Mining Appliances Co.* (1) Therefore, under either Act, the actual existence of a patent is not essential. If the defendant, having no patent, were claiming to be interested in a patent, he would be brought within the amended section. The section as amended did not make an exclusive licensee capable of

person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats;

"Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

By s. 20 and Schedule of Patents and Designs Act, 1919, s. 36 is amended as follows: "For the words 'to be the patentee of an invention' there shall be substituted the words 'to have an interest in a patent.'

"For the words 'any legal rights of the person making such threats' there shall be substituted the words 'the patent.'

"For the proviso there shall be substituted the following proviso: 'Provided that this section shall not apply if an action for infringement of the patent is commenced and prosecuted with due diligence.'"

(1) (1915) 32 R. P. C. 569.

bringing an action, but the effect of it was to make him a person claiming an interest in a patent. A person who says he is a patentee is claiming an interest in a patent. A patentee may still have rights under a patent which once existed, but which has expired, provided he brings his action in time. Sect. 10 of the Act of 1907 confers rights upon an applicant for a patent during the interval between the acceptance of the complete specification and the sealing of the patent. That section throws light upon the intention of the Legislature when enacting s. 36, as amended.

Frost for the defendant. The language of s. 36, as amended, is plain. The section can only apply to a case where there is a patent in existence the infringement of which is complained of by a person threatening proceedings and liability: the infringement referred to in the section and the proviso is the infringement of "the" patent and "his" patent respectively.

P. O. LAWRENCE J. This is an action brought to restrain threats made by the defendant in respect of an alleged infringement of an invention which, at the time when the threats were made, had been protected by a complete specification which had been accepted. The question to be determined is, whether the remedy conferred by s. 36 of the Patents and Designs Act, 1907, as amended by the Act of 1919, is available to the plaintiffs. [His Lordship then stated the facts as above set out and continued:] In these circumstances, the question is whether the plaintiffs are entitled to bring an action against Mr. Pogson under s. 36, as amended. As has been frequently pointed out, such an action is not an action to enforce any common law right. It is a statutory right of action conferred upon a person aggrieved, where groundless threats of legal proceedings have been made. In order to succeed in such an action, it is essential that the plaintiff should bring his case within the four corners of the section. In my judgment, the section presupposes the existence of a patent and does not apply to a case where there is no patent. The words are "Where any person claiming to have an interest in a patent . . . . threatens any other person with legal proceedings in respect of any alleged

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infringement of 'the' patent," the person aggrieved—reading it shortly—may bring an action and obtain an injunction against the continuance of the threats and may recover such damage as he has sustained, if the alleged infringement to which the threats related was not, in fact, an infringement of "the" patent; and the proviso is that the section "shall not apply, if an action for infringement of 'the' patent is commenced and prosecuted with due diligence." Having regard to this language I am of opinion that the section contemplates the existence of a patent in which a person has or claims to have an interest; that is to say, the person need not necessarily be the patentee, it is sufficient for the purposes of the section if he has, or claims to have, an interest in a patent.

Mr. Whitehead contends (as indeed he was compelled) that the section applies even if there is no patent in existence, and that if a person claiming to have an interest in a patent—although there is no patent in existence—threatens another with legal proceedings or liability in respect of the infringement of a non-existent patent, any aggrieved person can under the section bring an action in respect of such threat. In my judgment, that is not the right view.

Mr. Whitehead bases his contention on the fact that the amendment introduced by the Act of 1919 was intended to enlarge, and not to confine, the remedy which had been conferred by s. 36 as originally enacted by the Act of 1907. He argues that the words of the section as they stood before the amendment—namely, "Where any person claiming to be the patentee of an invention . . . . threatens," and so on—were wide enough to cover the case where there was no patent in existence, and that the real object of altering the wording of that section was tc enlarge the scope of the section, the construction of which had been narrowed by certain decisions and more particularly by the decision in the case of *Diamond Coal Cutter Co.* v. *Mining Appliances Co.* (1), in which it was held that the section, as then existing, did not cover the case of an exclusive or sole licensee threatening persons with legal

(1) 32 R. P. C. 569.

proceedings in respect of an alleged infringement of a patent. On the present occasion, I am not concerned to decide whether the view thus presented is correct or not, nor do I think that I am concerned to consider the reason or motive of the Legislature for the amendment which was introduced into the section by the Act of 1919. In my opinion the section as amended is less ambiguous and, as I have already stated, presupposes the existence of a patent; it therefore does not, in my judgment, apply to the case where there never was a patent in existence. It is true that under s. 10 the effect of the acceptance of a complete specification is to place the applicant for a patent in the position of having the like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance of the complete specification, except that he is not entitled to institute any proceedings for infringement until a patent for the invention has been granted to him. It may or may not have been owing to an oversight that the Legislature has not made an applicant whose complete specification has been accepted subject to the liability to be sued for groundless threats of legal proceedings during the period between the acceptance of the complete specification and the sealing of the patent, but I find nothing in s. 10 which induces me to hold that such an applicant is liable under s. 36, as amended, in respect of threats made by him during that period.

In my opinion, there being no patent, he could not, in fact, threaten legal proceedings or liability in respect of an alleged infringement of "the" patent, nor could the person aggrieved recover damages by proving that the alleged infringement, to which the threats related, was not, in fact, an infringement of "the" patent; in both cases, because there is no patent in existence. Moreover, the proviso clearly could not apply to a case where there was no patent in existence—as no action for an infringement of the patent could possibly be commenced or prosecuted with due diligence.

For these reasons, I hold that the action fails and must be dismissed.

H. C. H.

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ELLIS AND SONS v. POGSON.

The plaintiff appealed. The appeal was heard on May 29, 1923.

J. Whitehead K.C. and *Wallington* for the appellants. The learned judge has held, wrongly as we submit, that s. 36 as amended presupposes the existence of a patent.

[WARRINGTON L.J. How can the section have any effect if there is no patent in existence? The words are claiming to have an interest in "the patent."]

The section applies even if there be no patent in existence, and if a person claiming to have an interest in a patent, although there is no patent in existence, threatens another with legal proceedings in respect of the infringement of a non-existent patent, any aggrieved person can, under the section, bring an action to restrain the continuance of the threat. The object of the amendment of s. 36 was to enlarge its scope, the construction of the section having been narrowed by the decision in *Diamond Coal Cutter Co.* v. *Mining Appliances Co.* (1)

Frost for the respondent was not called upon.

LORD STERNDALE M.R. I think the appeal must be dismissed. After reading the learned judge's judgment, I entirely agree with his conclusions, and I equally agree with the reasoning upon which he founds them.

WARRINGTON L.J. I am of the same opinion. The question is whether s. 36 of the Patents and Designs Act, 1907, as amended by s. 20 of the Patents and Designs Act, 1919, which gives a remedy in case of groundless threats of legal proceedings, gives a right of action against a person who has not, and never had, a patent. The learned judge has decided that the section creates a new cause of action. Of course it does. At common law it was an essential of a cause of action for threats against a person in respect of property that those threats should originate in malice. Malice was an essential to the cause of action. The section creates a new cause of

(1) 32 R. P. C. 569.

action altogether, of which malice is not an ingredient. But then that cause of action is qualified in two ways. The section first of all provides a special defence to the action, because it enables the defendant to prove, if he can, that the alleged infringement in respect of which he was threatening was in fact an infringement; because damages can only be recovered if the alleged infringement to which the threats related was not in fact an infringement of the patent; but, in addition to that, the proviso excludes the application of the section altogether if an action for infringement of the patent is commenced and prosecuted with due diligence. Neither of those qualifications can apply if there is no patent at all. It seems to me that it is quite impossible to read the section otherwise than that it presupposes the existence of a patent; the patent creates a monopoly, and one of the conditions under which the patentee or the person interested in the patent enjoys the monopoly is that he should be subject to these actions for threats; but, again, his liability to be so subject is qualified in the two ways which I have mentioned; and the section if not read as the learned judge has read it would have a very much wider effect than it is possible to suppose that the Legislature intended. I agree that the appeal must be dismissed.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors: *Cohn, Seligman & Bax; Hiscocks & Co.*

G. A. S.

SARGANT J.

1923

May 2, 3, 4, 8, 9, 10, 15; *June* 13.

In re LETTERS PATENT No. 139,207.

In re CARBONIT AKTIENGESELLSCHAFT.

[1922. C 208.]

Costs—Patent—User by Government Department—Application for Remuneration—Patents and Designs Act, 1919 (9 & 10 *Geo.* 5, *c.* 80), *s.* 8—*Rules of the Supreme Court, Order* LIII. A, *r.* 9, *Order* LXV.

On an application by a patentee under s. 8 of the Patents and Designs Act, 1919, claiming remuneration for the user of the patented invention by a Government department, the Court has discretion to award costs for or against the Government department. The rule that the Crown neither receives nor pays costs does not apply.

ORIGINATING MOTION.

The Carbonit Aktiengesellschaft and Georg Schmidt were the registered legal owners of Letters Patent No. 139,207, granted to them for an invention of a "process and apparatus for unloading ammunition shells and like coverings filled with explosives in the condition of a solid aggregate."

They brought this motion under the Patents and Designs Acts, 1907 and 1919, against the head of the Disposals Board claiming an inquiry as to the remuneration proper to be paid in respect of the use by His Majesty's Government of the said invention and payment of the amount found due upon such inquiry. Points of claim and defence were delivered and the respondent set up (amongst others) the defence that the Letters Patent were invalid; and he delivered particulars of objections alleging prior public user, at (amongst other places) the National Filling Factory, Chilwell, prior general knowledge, want of subject matter and lack of utility. At the hearing the respondent asked for and obtained leave to amend by alleging as an additional ground of defence that the invention had before the date of the patent been tried by or on behalf of the Government Departments using it so as to disentitle the applicants to remuneration for any user thereof by virtue of s. 8 of the Patents and Designs Act, 1919. (1)

(1) Sect. 8 provides: "For section twenty-nine of the principal Act

After the hearing had continued for five days, the applicants withdrew their claim for remuneration in view of the evidence tendered by the respondent proving a prior experimental trial of the invention at the National Filling Factory, Chilwell.

The question then arose whether the prima facie rule that the Crown neither paid nor received costs applied to these proceedings or whether the costs were within the discretion of the Court, and it is on this question alone that the proceedings call for report.

J. Whitehead K.C. and *Courtney Terrell* (*Sir Douglas Hogg A.-G.* with them) for the respondent. The application should be dismissed with costs. At various interlocutory proceedings the Master made orders as to costs on the footing that the respondent was in the position of an ordinary litigant. This

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[the Patents and Designs Act, 1907] the following section shall be substituted :—

"29.—(1.) A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject :

"Provided that any Government department may, by themselves or by such of their agents, contractors, or others as may be authorised in writing by them at any time after the application, make, use or exercise the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the Department and the patentee, or, in default of agreement, as may be settled in the manner hereinafter provided. And the terms of any agreement or licence concluded between the inventor or patentee and any person other than a Government department, shall be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown :

"Provided further that, where an invention which is the subject of any patent has, before the date of the patent, been duly recorded in a document by, or tried by or on behalf of, any Government department (such invention not having been communicated directly or indirectly by the applicant for the patent or the patentee), any Government department, or such of their agents, contractors, or others, as may be authorised in writing by them, may make, use and exercise the invention so recorded or tried for the service of the Crown, free of any royalty or other payment to the patentee, notwithstanding the existence of the patent. . . . .

"(2.) In case of any dispute as to the making, use or exercise of an invention under this section, or the terms therefor, or as to the existence or scope of any record or trial as aforesaid, the matter shall be referred to the court for decision, who shall have power to refer the whole matter or any question or issue of fact arising thereon to be tried before a special or official referee or an arbitrator upon such terms as it may direct. . . . ."

SARGANT J.

1923

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was done in the presence of the applicants and amounted to a special bargain between the parties that costs should follow the event.

But if this be not so, the prima facie rule that the Crown neither pays nor receives costs does not apply. It is a common law rule and there is no such rule in equity. In numerous cases too the rule is not acted upon: *Johnson* v. *The King* (1), where Lord Macnaghten states the heads under which these exceptional cases fall. Under s. 29 of the Patents and Designs Act, 1907, provision was made for a reference of the question of remuneration to the Treasury, and the Crown did not then receive costs. That does not apply to proceedings under s. 8 of the Act of 1919. That section takes the place of s. 29 of the Act of 1907, and under it the question of the validity of the patent and infringement can be determined. In dealing with matters of this kind the Court has a discretion as to costs: compare *Rex* v. *Comptroller-General of Patents*. (2) There is no provision in the Act of 1907 with regard to costs, but in s. 12 of the Act of 1919 the Comptroller is given power to award any party costs in proceedings taken before him, and the Crown is sometimes a party in the Comptroller's Court. When an Act contains some reference to the Crown and provides for or contemplates orders as to costs, the Crown is in the same position with regard to costs as an ordinary litigant in any proceedings under the Act in *Thomas* v. *Pritchard*. (3)

[SARGANT J. Sect. 8 of the Act of 1919 has nothing to do with the Comptroller's Court.]

Under s. 8, sub-s. 2, the Court has power to refer any issues to arbitration and to decide how the costs of the reference should be borne. It would be anomalous if the Court had not a like discretion in regard to proceedings before it under the section. Order LIII.A, r. 9, gives the Court a discretion in patent proceedings as to costs, except as expressly provided in r. 3 (*w*) of the same order. That sub-rule deprives the Comptroller-General and the Board of Trade of any right to

(1) [1904] A. C. 817, 824. (2) (1922) 39 R. P. C. 335.
(3) [1903] 1 K. B. 209, 213.

costs on their appearance on or opposition to the granting of a petition under s. 18 of the Act of 1907. It seems to follow from the specific mention of this exception that in all other patent cases where the Crown is a party Order LIII.A, r. 9, applies.

Again the present application is analogous to a petition of right and falls therefore within the second head of exceptions specified by Lord Macnaghten in *Johnson* v. *The King*. (1) A petition of right is an appropriate form of proceeding for ascertaining whether the Crown has been making use of the petitioner's property, but it does not lie with regard to a patented invention, because the patent is a franchise and its infringement a tort: *Feather* v. *The Queen*. (2) A special procedure of an analogous nature had therefore to be provided in later Patent Acts.

Lastly, this is an exceptional case such as was mentioned by Lord Macnaghten in *Johnson* v. *The King* (1) as justifying a departure from the prima facie rule.

Maugham K.C., *Hunter Gray K.C.* and *Trevor Watson* for the applicants. There was no special bargain as to how the costs were to be dealt with, and it must be determined by reference solely to the general law. The rule is that in matters affecting any prerogative of the Crown, it neither pays nor receives costs: *Rex* v. *Archbishop of Canterbury*. (3) In these circumstances reliance has been placed by the respondent on *Johnson* v. *The King* (1); but that was a decision of the Privy Council and only determined the practice to be followed by that body for the future. It did not alter the rule in the High Court. Indeed in *Rex* v. *Archbishop of Canterbury* (3) and many subsequent cases regret has been expressed that the matter had not been made the subject of special legislation: compare *Thomas* v. *Pritchard*. (4) Now s. 8 of the Act of 1919 is a section that alters and affects the royal prerogative. It provides that a patent shall have the like effect against the King as against a subject, and then by way of proviso gives the King in certain respects

(1) [1904] A. C. 817, 824.
(2) (1865) 6 B. & S. 257, 297.
(3) [1902] 2 K. B. 503, 571, 572.
(4) [1903] 1 K. B. 209, 215.

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a more favoured position. Reliance has been placed on sub-s. 2 of this section, but it does not relate to ordinary litigation but to the determination of the amount (if any) to be paid to the patentee by way of compensation. It is a mere compensation clause, and the question of validity cannot be decided under it except with the consent of the parties.

[SARGANT J. In order to succeed must not the applicants establish that this is not a proceeding within Order LIII.A, r. 9 ?]

Order LIII.A, r. 9, does not refer to the Crown and cannot affect it. Nor can a provision in the Patents and Designs Act, 1919, relating to costs before the Comptroller affect the position under s. 8. There must be a provision enabling the Court to award costs in the Act in which the Crown is mentioned to make *Thomas* v. *Pritchard* (1) applicable. The reason why the Crown was awarded costs in *Rex* v. *Comptroller-General of Patents* (2) was that proceedings by mandamus against a servant of the Crown having statutory duties towards the public are not subject to the general rule about the costs of the Crown: *Rex* v. *Commissioners for Special Purposes of Income Tax.* (3)

Further there are no special circumstances here to justify a departure from the general rule as to the Crown's costs. This is not an analogous proceeding to a petition of right. It is an application under a statute which contains no provision as to costs.

J. Whitehead K.C. in reply. The question in issue in these proceedings has been with regard to the user of a patented invention by a Government department and that is a matter "incidental to departmental administration" within the words of Wright J. in *Rex* v. *Archbishop of Canterbury* (4), so that the Crown is entitled to costs. Further the ordinary rule as stated by Lord Macnaghten in *Johnson* v. *The King* (5) applies to the High Court as well as the Privy Council: compare

(1) [1903] 1 K. B. 209.
(2) 39 R. P. C. 335.
(3) [1920] 1 K. B. 26, 46.
(4) [1902] 2 K. B. 503, 572.
(5) [1904] A. C. 817, 824.

Daniell's Chancery Practice, 8th ed., p. 46. In any case Order LIII.A, r. 9, gives the Court a discretion as to the costs.

Assuming then that the Court has a discretion as to the costs, it ought to certify all the particulars of objection, except that as to want of utility, to be reasonable and give the respondent the general costs. The applicants should only receive the costs of and incidental to the amendment sanctioned.

[He also referred to the form of order in *Baird* v. *Moule's Patent Earth Closet Co., Ld.* (1)]

Trevor Watson in reply on the form of order. The applicants ought not to have to pay costs down to the date of the amendment allowed at the hearing.

Cur. adv. vult.

June 13. SARGANT J. delivered the following judgment. This is an originating motion, the first I think of its kind, taken out under the Patents and Designs Acts, 1907 and 1919, and seeking the determination of a dispute which has arisen between the applicants and the respondent as to the use and exercise of a patented invention by or on behalf of the Disposals Board of His Majesty's Government, or by contractors to the Board. By s. 29 of the Patents and Designs Act, 1907, provision was made for the ascertainment by the Treasury as therein mentioned of the terms on which any Government Department or their contractors might use an invention protected by a patent. But the section was only appropriate to cases where both the validity of the patent and the fact of the user of the patented invention were admitted; and in cases where there was a dispute as to validity or user or both no machinery was provided for determining the dispute. This omission was made good by s. 8 of the Patents and Designs Act, 1919, which has repealed s. 29 of the Act of 1907, and substituted for it a new and much more elaborate section, which does contain machinery, as hereinafter mentioned, for dealing with any such dispute.

In the present case, after evidence had been given before

(1) (1876) 17 Ch. D. 139n.

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me for some days it became clear that there had been at least an experimental user of the patented invention by the department sufficient to satisfy the special terms of the section, and to free them from any obligation to pay compensation; and accordingly the applicants were constrained to abandon their claim. There still, however, remained the question how the costs of the proceedings should be dealt with, in view of the general or prima facie rule that the Crown neither pays nor receives costs. And on this question I thought it well to reserve my decision, particularly in view of the novelty of the proceeding.

It was urged on behalf of the respondent, who is sued as the head of the department in question, that, whatever the general rule, the parties had in this case come to an agreement that the costs should be dealt with in the same manner as if the proceedings had been between private individuals. And attention was called to the fact that in the course of various interlocutory proceedings before the Master orders had been made for costs without any objection on either side, and also that shortly before the hearing an arrangement had been made as to the costs of the shorthand notes being costs in the cause. But, although those orders and that arrangement may be binding as regards the particular costs so dealt with, and may indicate the general view or impression of the parties as to what would happen as regards the general costs of the proceedings, I do not think they amounted to an actual agreement, express or implied, as to those general costs. These must, in my view, be dealt with independently of any special bargain.

The general rule undoubtedly is that the Crown neither pays nor receives costs: *Rex* v. *Archbishop of Canterbury*. (1) But there are various heads of exception from this rule: *Johnson* v. *The King*. (2) And it seems clear that, if a statute expressly or impliedly mentions the Crown or a Government department, and provides for or contemplates costs, then the general rule ceases to apply and the Crown or the department is in the same position in this respect

(1) [1902] 2 K. B. 503, 521. (2) [1904] A. C. 817.

as an ordinary litigant: *Moore* v. *Smith* (1); *Thomas* v. *Pritchard*. (2)

Now under the Patents and Designs Act, 1907, certain proceedings might be taken by or on behalf of the Crown, such as the presentation of a petition under s. 25, sub-s. 3; and by Order LIII.A, r. 9, all costs under that Act, except the costs of the Crown in respect of petitions to prolong patents under s. 18 of the Act, were to be in the discretion of the Court. In that state of things (and for the purpose of interpreting the new legislation it seems immaterial whether the provision as to costs in Order LIII.A, r. 9, was ultra vires as regards Crown costs or not) the Patents and Designs Act, 1919, entirely reconstitutes s. 29 of the Act of 1907, and provides by sub-s. 2 that disputes such as the present between patentees and the Crown or its departments shall be referred to the Court for decision and that the Court may refer the whole matter or any question or issue to be tried before a special or official referee or arbitrator upon such terms as it may direct. This new provision seems clearly to enable the Court to give directions as to the costs of any such issue or question when tried before an official referee or arbitrator; and indeed apart from such directions the costs of any such arbitration would appear to be provided for by the Arbitration Act, 1889. And it would be anomalous if the Court, when dealing with the whole matter itself, should have a more limited power of adjudging costs, particularly in view of the general jurisdiction of the Court as to costs under Order LXV., and the special jurisdiction given or purporting to have been given to it under Order LIII.A, r. 9. In my judgment, therefore, the provision made by s. 8 of the Act of 1919 for the determination of disputes such as that now in question has given the Court power to deal with the costs of the determination.

Having then the power to award costs I feel satisfied that I ought to exercise it by giving the respondent the general costs of the originating motion, and by certifying that all his particulars of objection were reasonable, except objection No. 3 as to want of utility. It was urged for the applicants

(1) (1859) 1 E. & E. 597. (2) [1903] 1 K. B. 209.

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that some exception ought to be made as to the costs prior to the last amendment made with regard to the use of the invention at the Chilwell Factory, inasmuch as until the actual hearing this had been pleaded only as public prior user and not also as an experimental user within s. 29. But in view of all the facts in connection with this user I do not think that I ought to make any order as to this further reamendment at the hearing other than the usual order that the costs, if any, occasioned by such further reamendment at the hearing should be the applicants' costs. All orders as to costs made on the various interlocutory proceedings will, of course, be undisturbed.

Solicitors: *Mills, Lockyer, Church & Evill; Treasury Solicitor.*

H. C. G.

SARGANT J. 1923 *June* 14, 15.

CULLY *v.* PARSONS.

[1922. C. 3466.]

Company—Debenture—Construction—Receiver—Appointment by Debenture Holder—Receiver Agent of Company—Conveyancing Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 24, *sub-s.* 2.

A company issued a debenture charging the whole of its assets, and by a condition indorsed on and forming part of the debenture it was provided that: "At any time after the principal moneys hereby secured become payable the registered holder of the debenture may from time to time by writing under his hand appoint any person or persons to be a receiver or receivers of the property charged by his debenture. . . . . And a receiver so appointed shall have power—(1.) To take possession of collect and get in the property charged by the debenture. (2.) To carry on or concur in carrying on the business of the company. (3,) To sell or concur in selling any of the property charged by this debenture . . . . and to carry any such sale into effect by conveying or assigning in the name and on behalf of the company. (4.) To make any arrangement or compromise which he or they shall think expedient in the interest of the . . . . holder of this debenture. And all moneys received by such receiver or receivers shall after providing for the matters specified in the first three parts of sub-section 8 of section 24 of the Conveyancing and Law of Property Act, 1881, and for the purposes aforesaid be applied in or towards satisfaction of this debenture. And the foregoing provisions in this condition

shall take effect as and by way of variation and extension of the provisions of ss. 19, 20, 21, 22, 23, and 24 of the said Act (which provisions so varied and extended shall be regarded as incorporated herein) and the holder of this debenture shall not in making or consenting to such appointment incur any liability to the receiver for his remuneration or otherwise."

The principal moneys secured by the debenture having become payable, a receiver was appointed by the debenture holder. In carrying on the business the receiver incurred a debt to the plaintiff for work done which could not be paid out of the assets when realized:—

Held, that the effect of the last provision in the condition was to relieve the debenture holder of liability not only to the receiver but also to other persons for the acts of the receiver and to render the receiver the agent of the company.

Deyes v. *Wood* [1911] 1 K. B. 806 distinguished.

ACTION.

The defendant company, the Sunbeam Laundry Company, Ld., carried on the business of a laundry at Salisbury and created and issued on September 14, 1921, a debenture in favour of the defendant Parsons for a sum of 887*l.* 12*s.* payable on October 1, 1921. The debenture was a specific charge on certain book-debts, plant and machinery and a floating charge on the other assets. It was issued subject (inter alia) to the following condition:—

Condition 7: "At any time after the principal moneys hereby secured become payable the registered holder of the debenture may from time to time by writing under his hand appoint any person or persons to be a receiver or receivers of the property charged by his debenture. . . . . And a receiver so appointed shall have power—

(1.) To take possession of collect and get in the property charged by the debenture.

(2.) To carry on or concur in carrying on the business of the company.

(3.) To sell or concur in selling any of the property charged by this debenture . . . . and to carry any such sale into effect by conveying or assigning in the name and on behalf of the company.

(4.) To make any arrangement or compromise which he or they shall think expedient in the interest of the respective holder of this debenture.

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And all moneys received by such receiver or receivers shall after providing for the matters specified in the first three parts of sub-section 8 of section 24 of the Conveyancing and Law of Property Act, 1881, and for the purposes aforesaid be applied in or towards satisfaction of this debenture And the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of ss. 19, 20, 21, 22, 23, and 24 of the said Act (which provisions so varied and extended shall be regarded as incorporated herein) and the holder of this debenture shall not in making or consenting to such appointment incur any liability to the receiver for his remuneration or otherwise."

The principal moneys having become payable and the company being in financial difficulties, the defendant Parsons on October 10, 1921, appointed the defendant Sharples to be a receiver of the property charged by the debenture. Since February, 1921, the company had employed the plaintiff to do the transport work of the laundry business and was at the date of the appointment of the receiver in debt to him for some 510*l*. It was also in debt to the defendant Parsons for some 4000*l*.

On October 17, 1921, an interview took place between the plaintiff, the defendant Parsons and the defendant Sharples to consider whether the business of the company should be carried on, in which event it would be necessary for the defendant Parsons to advance further money for the purpose.

An arrangement was come to at this interview and was reduced to writing in a letter prepared at the time and signed by the defendant Parsons and addressed to the plaintiff. The material part of the letter was as follows: "As an outcome of our conversation to-day, I am quite prepared to protect your interests pro rata with my own in the receivership I have appointed for the Sunbeam Laundry Company, Ld., that is to say, that in the event of a sale of the company's assets you will participate in the proceeds of same in the same proportion which the company's indebtedness to you bears to the company's indebtedness to myself. . . . . This arrangement has been agreed to between us in

order to induce me to make a further loan to the company for the benefit of the business and is subject to your continuing with the transport work on behalf of the receiver, he to make arrangements to pay you for all work undertaken by you."

The company's business was accordingly carried on by the receiver, but it was unsuccessful, and ultimately the receiver sold all the assets of the company. As a result of the carrying on of the business a further debt was incurred to the plaintiff for 392*l.* 12*s.* in respect of transport work. No payment was received by the plaintiff or the defendant Parsons out of the proceeds of sale of the assets of the company.

In these circumstances, the plaintiff brought this action against the defendants Parsons and Sharples and the company claiming as against the company payment of the amount due for transport work and as against the defendants Parsons and Sharples judgment for 392*l.* 12*s.*

The company put in no defence. The evidence showed that the defendant Sharples had disposed of all the assets in his hands as receiver and it was not contended seriously that he was under any personal liability to the plaintiff. The only question calling for report is whether the defendant Parsons was liable to the plaintiff for the debt to him incurred by the receiver.

Galbraith K.C. and *H. B. Vaisey* for the plaintiff. The receiver was the agent of the defendant Parsons. It is true that when a debenture incorporates s. 24 of the Conveyancing Act, 1881, a receiver appointed under it is prima facie the agent of the company. But the scheme of the debenture may indicate a contrary intention: *In re Vimbos, Ld.* (1); *Robinson Printing Co.* v. *Chic, Ld.* (2)

[SARGANT J. In neither of those cases was s. 24, sub-s. 2, of the Conveyancing Act, 1881, made applicable.]

That is so, but in *Deyes* v. *Wood* (3) the debenture was construed as incorporating the section, and its language closely

(1) [1900] 1 Ch. 470. (2) [1905] 2 Ch. 123.
(3) [1911] 1 K. B. 806.

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resembled the debenture in the present case. Notwithstanding this, it was held that the receiver was the agent of the debenture holder, who was therefore liable for his remuneration.

[SARGANT J. There is here an express provision that the debenture holder in making the appointment "is to incur no liability to the receiver for his remuneration or otherwise."]

That refers only to the remuneration and expenses of the receiver, and the position otherwise remains unchanged. It is true that this addition has been made to the common form debenture since the decision in *Deyes* v. *Wood* (1); but it does not go far enough to relieve the debenture holder of liability to persons with whom the receiver trades.

Even however if the defendant Parsons would have been under no liability on the terms of the debenture by itself, he is liable to the plaintiff on the special bargain between the parties.

A. Grant K.C. and *W. S. M. Knight* for the defendant Parsons. The words added to the form of debenture take the case out of the principle of *Deyes* v. *Wood*. (1) These words relate to liability—to the receiver for his remuneration—or otherwise. In any case the defendant Parsons is protected by the special bargain contained in the letter of October 17, 1921.

W. S. M. Knight for the defendant Sharples.

Galbraith K.C. in reply.

SARGANT J. [after stating the facts and deciding that the claim against the defendant Sharples failed continued:] I have now to consider the claim against the defendant Parsons. The condition in his debenture that authorizes the appointment of a receiver incorporates s. 24 of the Conveyancing Act, 1881, and under sub-s. 2 of that section it is provided that: "The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides." Prima facie, therefore, the receiver

(1) [1911] 1 K. B. 806.

in this case was the agent of the company and not of the defendant Parsons. Three cases have however been referred to which are said to displace this presumption. The first two cases are *In re Vimbos, Ld.* (1) and *Robinson Printing Co.* v. *Chic, Ld.* (2); but when they are examined they are found not to apply here, because, although the language of the debentures in those cases is not unlike that used in the debenture in the present case, there was no incorporation of s. 24, sub-s. 2, of the Act. I think therefore that those two cases are of no importance for the purpose of this case.

On the other hand there is a decision of the Court of Appeal in *Deyes* v. *Wood* (3) which is of great importance. In that case the sections of the Conveyancing Act, 1881, intended to be incorporated were left blank in the condition, but the Court came to the conclusion that it was intended to incorporate s. 24, which would prima facie have the effect of constituting the receiver the agent of the mortgagor. But then after referring to the other provisions in the condition, which closely resembled those in the present case, and particularly to the words incorporating the sections of the Act as varied and extended by the rest of the condition the Court came to the conclusion that the total effect of the condition was to render the debenture holders liable to the receiver as their agent. That is a decision of high authority; but the result appears to have been that an alteration was made in the common form debenture adopted down to that time. Persons lending money to a company were not ready to accept debentures which rendered them personally liable for the acts of receivers appointed by them. They had thought, probably, that the incorporation of s. 24 of the Conveyancing Act, 1881, would be enough to protect them; but the Court of Appeal having decided to the contrary, an addition was made to the common form debenture which appears in the debenture in question here. After the passage incorporating certain sections of the Act (including s. 24) subject to variations, the significant words

(1) [1900] 1 Ch. 470. (2) [1905] 2 Ch. 123.
(3) [1911] 1 K. B. 806.

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were added: "And the holder of this debenture shall not, in making or consenting to such appointment, incur any liability to the receiver for his remuneration or otherwise."

The actual decision in *Deyes* v. *Wood* (1) was that the debenture holders who appointed the receiver were liable for his remuneration, but the principle upon which that decision was founded was that the receiver was their agent, so that they would also be liable to all persons dealing with the receiver. The question is whether the additional words I have mentioned were intended to exclude any liability of the debenture holder for acts of the receiver not only to the receiver himself but also to third parties. Mr. Galbraith sought to construe the added words as relating only to liability to the receiver—for his remuneration or otherwise—so that the position with regard to third parties would remain unaffected. On the other side it was argued that they must be construed as relating to liability—to the receiver for his remuneration—or otherwise. In my view the latter is the true construction. The liability to which debenture holders had been subjected by the principle of the decision in *Deyes* v. *Wood* (1) was a liability not only to the receiver for his remuneration and expenses but to any one dealing with the receiver. It is quite clear that the additional words were inserted as a result of the decision in *Deyes* v. *Wood* (1), and to construe them as applying only to the liability to the receiver would be to put too narrow a construction on them. The object was to restore the prima facie effect of the incorporation of s. 24 of the Conveyancing Act, 1881, which had been watered down or rather almost entirely negatived by that decision of the Court of Appeal.

In my judgment therefore the debenture here provides on its true construction that the debenture holder is not to be liable as the principal for any of the acts of the receiver appointed by him and that the receiver shall be the agent of the company.

I proceed to consider the further question of the effect of the arrangement come to on October 17, 1921, and in

(1) [1911] 1 K. B. 806.

considering it, I start from the point of view that the defendant Parsons is not made liable by the terms of his debenture for the debts incurred by the receiver to the plaintiff. Was that position altered by the arrangement between the defendant Parsons and the plaintiff embodied in the letter of October 17, 1921? So far is it from being altered to the disadvantage of the defendant Parsons that if, apart from any special bargain, the defendant Parsons could have been held liable to the plaintiff, this arrangement would in my judgment have protected him, especially when regard is had to the circumstances that the defendant Parsons lived away from Salisbury, that the receiver he had appointed was the ordinary manager of the business at Salisbury, and that the plaintiff also was in Salisbury and in a position therefore to protect his own interests. The last clause of the letter seems to me to amount to a definite arrangement that the plaintiff is not to look to the defendant Parsons for payment of his bill from time to time. The plaintiff being at Salisbury when the business is being carried on he and the receiver are to make their own arrangements for his payment for all work undertaken by him.

Therefore both on the general view of the legal position under this debenture and on this special bargain I hold that the defendant Parsons is not liable to the plaintiff for orders for transport work given by the receiver to the plaintiff after the date of the interview of October 17, 1921.

[His Lordship then gave judgment against the company for the amount due for transport.]

Solicitors: *Taylor, Jelf & Co., for Trethowan & Vincent, Salisbury; Bracewell & Leaver.*

H. C. G

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June 20, 21, 22, 26, 27, 28, 29; *July* 3, 4, 5, 6.

RICHARDS *v.* DUFFRYN ABERDARE COLLIERY COMPANY, LIMITED.

[1922. R. 629.]

Coal Mine—Checkweigher—Stoppage of Mine—Threat not to reopen with same Checkweigher—Offence—Coal Mines Regulation Act, 1887 (50 & 51 *Vict. c.* 58), *s.* 13—*Coal Mines (Checkweigher) Act*, 1894 (57 & 58 *Vict. c.* 52), *s.* 1.

A person duly appointed to be a checkweigher by the other miners under the Coal Mines Regulation Acts, 1887 to 1905 ceases to be a checkweigher on the expiry of notices determining the contracts of all the individual miners.

Whitehead v. *Holdsworth* (1878) 4 Ex. D. 13 and *Merryton Coal Co.* v. *Anderson* (1890) 18 R. 203 followed.

By the Coal Mines (Checkweigher) Act, 1894, s. 1: "If the owner, agent, or manager of any mine, or any person employed by or acting under the instructions of any such owner, agent, or manager, ... attempts whether by threats, bribes, promises, notice of dismissal, or otherwise howsoever, to exercise improper influence in respect of such appointment, or to induce the persons entitled to appoint a checkweigher, or any of them, not to reappoint a checkweigher . . . ., such owner, agent, or manager shall be guilty of an offence against the Coal Mines Regulation Act, 1887":—

Held, that threats made during a bona fide stoppage of a mine, after all the contracts with the workmen had been determined and before the mine reopened, not to reopen the mine if the old checkweigher was continued in that position was not an offence under the above section, which applied only to acts done while the mine was a going concern.

WITNESS ACTION.

In November, 1918, the plaintiff was elected by ballot of the miners at the Tower Colliery, Hirwain, in accordance with the provisions of the Coal Mines Regulation Acts, 1887 to 1905, to be their checkweigher. In May, 1919, the colliery was acquired by the defendants, the Duffryn Aberdare Colliery Company. At all material times the defendant Sir David R. Llewellyn was the chairman and managing director of the defendant company and the defendant Richard Buxton was the agent of the colliery. The remaining eleven defendants were workmen employed at the colliery.

On March 14, 1921, notices were served on all the workmen at the Tower Colliery terminating their individual contracts

as from March 28, 1921, when the national stoppage of coal mines commenced. During the stoppage all work at the colliery ceased. Towards the end of June, 1921, the plaintiff wrote a letter for publication in the *Aberdare Leader* urging the miners, if they returned to work on the terms then being negotiated, which he described as slavery conditions, to adopt what is commonly known as the "ca' canny" policy of doing as little work as possible. Those terms of settlement were adopted, and a deputation from the local lodge of the South Wales Miners' Federation went to the defendant Buxton to ask as to the reopening of the Tower Colliery. A meeting was arranged to take place on July 2, 1921, before the mine reopened, between the committee of the lodge and the defendants Llewellyn and Buxton. At the meeting the defendant Llewellyn referred to the plaintiff's letter in the *Aberdare Leader* and said that he and his co-directors were of opinion that it was impossible to reopen the colliery while the men were advised to do as little work as they could. He had told the defendant Buxton and the other officials not to negotiate with the plaintiff on any point regarding the workmen. He continued according to a note taken at the time: "I have given every consideration to the poverty and suffering it will mean to the people, but I have also given you the conditions under which the colliery is open. It is for you to decide. If you like you can keep G. R. [the plaintiff] in retirement, but on no account is he to have anything to do with my collieries, and I don't think the development of Hirwain is possible while G. R. is here." The plaintiff then spoke and said: "I warn everybody that if the men through their suffering are forced back under slavery conditions, I advise the men to do as little as possible"; and he then went on to urge them to fight the defendant Llewellyn.

In consequence of this the following resolution was passed on July 4, 1921, by the workmen of the Tower and adjoining collieries: "That this meeting of the workmen of the Tower Tir, Herbert and New Drift Collieries after due consideration to the report of the joint committee of the above collieries do hereby agree that we earnestly appeal to Mr. D. R. Llewellyn

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to reconsider his decision re closing down the mines and allow the charge brought against Gwilym Richards to be dealt with in a constitutional manner, and that in the meantime the works be thrown open for employment and that Mr. Gwilym Richards shall refrain from presenting himself at the collieries until the Conciliation Board gives its decision."

This suggestion was accepted and the colliery was reopened next day. The case of the plaintiff was referred to the Board of Conciliation for the coal trade of Monmouthshire and South Wales, and the Conciliation Board referred the matter to two arbitrators representing employers and workmen respectively. On November 29, 1921, they made an award that the colliery company "cannot dictate to their workmen as to whom they shall appoint as their checkweigher. . . . ." Soon afterwards the plaintiff resumed work as checkweigher but without re-election.

Between July, 1921, and February, 1922, working at the colliery was from time to time suspended for reasons connected with the industry. One of these suspensions of working was on December 5, and the defendant workmen then formed themselves into a committee and got up a petition for signature by the workmen expressing their willingness to work without the plaintiff. In January a second petition was originated by the same persons and was signed by the great majority of the workmen. This petition expressed a willingness to work without the plaintiff and a desire to co operate with the management. This petition was handed to the defendant Buxton and sent by him to the defendant Llewellyn early in February, when there was a stoppage of work at the mine. Thereupon the mine was reopened on February 13, 1922, but when the plaintiff presented himself on February 13 and 14 for work, he was not allowed to do the work of a checkweigher and the management persisted in refusing this.

In these circumstances the plaintiff brought this action charging the defendants (inter alia) with conspiring wrongfully and maliciously and with intent to injure him in

(*a*) attempting to obtain and procuring breaches of his contract of employment with the workmen at the colliery as checkweigher; (*b*) preventing or attempting to prevent the plaintiff from acting as checkweigher and receiving the emoluments of that office; and (*c*) interfering with or attempting to exercise improper influence in respect of the plaintiff as checkweigher and inducing or attempting to induce the persons entitled to appoint or reappoint the plaintiff not to appoint or reappoint the plaintiff to this office.

Sargant J. held on the facts that there had been no such conspiracy, that the management had accepted the award of November 29, 1921, loyally, and that the subsequent efforts to remove the plaintiff from his office originated entirely with the workmen themselves, and were due to more moderate counsels prevailing and the majority of the men coming to deprecate the extreme views that had been put forward by the plaintiff.

The further questions (inter alia) arose in the action: (1.) whether after the national stoppage in 1921 the plaintiff resumed as a duly elected checkweigher and did not require re-election by ballot; and (2.) whether by the statements and course of conduct adopted by the defendant Llewellyn on July 2, 1921, he had not infringed s. 1 of the Coal Mines (Checkweigher) Act, 1894.

Upjohn K.C., *Galbraith K.C.* and *Slesser* for the plaintiff. The plaintiff continued to be a duly elected checkweigher under the Coal Mines Regulation Acts, 1887 to 1905, after the national stoppage. It is true that in *Whitehead* v. *Holdsworth* (1) it was held that a checkweigher appointed under the Coal Mines Regulation Act, 1872, s. 18, ceased to be checkweigher on the dismissal of all the miners. That section was repealed by the Coal Mines Regulation Act, 1887, but substantially re-enacted by s. 13 of that Act. The decision in *Whitehead* v. *Holdsworth* (1) was followed in *Merryton Coal Co.* v. *Anderson*. (2)

(1) 4 Ex. D. 13. (2) 18 R. 203.

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[SARGANT J. I must consider myself bound by those decisions.]

With regard to the remaining questions the plaintiff contends that the defendant Llewellyn was guilty of conduct constituting a breach of s. 1 of the Coal Mines (Checkweigher) Act, 1894 (1), in that he attempted to induce the persons entitled to reappoint the plaintiff not to do so.

Maugham K.C., *Greene K.C.* and *A. T. James* for the defendants. There has been no breach of s. 1 of the Act of 1894. On July 2, 1921, when the defendant Llewellyn did the acts complained of the mine was closed down and there was no checkweigher and no body in existence with power to reappoint a checkweigher. Further the section is in terms directed against exercising "improper influence," and this suggests that there are proper modes in which the management might influence the reappointment of the plaintiff. Further even if there was a breach of the section, it would not give the checkweigher a right in damages. The only remedy is to punish it as an offence under the Coal Mines Regulation Act, 1887. The section does not in terms prohibit anything, but simply provides that certain acts by the owner, agent or manager of a mine will be an offence: compare *Phillips* v. *Britannia Hygienic Laundry Co.* (2)

Upjohn K.C. in reply. There has been an offence within the Act of 1894. If the section was construed as applying only when a mine was a going concern, the management could always close the mine and refuse to reopen it unless the men appointed some other person as a checkweigher. In *Whitehead* v. *Holdsworth* (3) the respondents dismissed the men and closed the mine for a day in order to get rid of the

(1) Coal Mines (Checkweigher) Act, 1894, s. 1: "If the owner, agent, or manager of any mine, or any person employed by or acting under the instructions of any such owner, agent, or manager, interferes with the appointment of a checkweigher, ... or attempts whether by threats, bribes, promises, notice of dismissal, or otherwise howsoever to exercise improper influence in respect of such appointment, or to induce the persons entitled to appoint a checkweigher, or any of them, not to reappoint a checkweigher . . . ., such owner, agent, or manager shall be guilty of an offence against the Coal Mines Regulation Act, 1887."

(2) (1923) 39 Times L. R. 530.

(3) 4 Ex. D. 13.

checkweigher. It was just this sort of thing the Act of 1894 was intended to prevent. As regards the contention that there may be proper modes of exercising influence, it is unnecessary to rely on that part of the section. The defendant Llewellyn has attempted "to induce the persons entitled to appoint a checkweigher . . . . not to reappoint a checkweigher" by threats not to reopen the mine if this was done.

[SARGANT J. Do you suggest that the provision as to inducement covers the cases that would not be covered by the provision against exercising "improper influence."]

Inducing is not the same thing as influencing. If this view be correct, the management has interfered with the plaintiff's means of livelihood by illegal means and a right to damages arises.

SARGANT J. [after stating the facts, and determining that on those facts there had been no conspiracy such as was alleged, continued]: I have now to consider whether an offence was committed on July 2, 1921, under the Coal Mines (Checkweigher) Act, 1894. That is a very stringent statute and imposes certain penalties for doing certain acts. Under the Coal Mines Regulation Act, 1887 to 1905, provisions were made for the appointment by the miners of checkweighers whose duty was to check the minerals gotten on behalf of the men and to see that they were properly paid. The checkweigher's remuneration was to be deducted from the wages of the persons on whose behalf he was employed. It was decided in *Whitehead* v. *Holdsworth* (1), the decision in which was followed by a Scotch Court in *Merryton Coal Co.* v. *Anderson* (2), that if the contracts of the workmen at the mine were terminated by notice, then on the resumption of work at the mine, the checkweigher was not necessarily to remain there without a fresh appointment. The organisation had come to a stop for the time being, and when work was resumed it was necessary that there should be a fresh appointment. That no doubt did open the door to the management's

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closing of the mine for the very purpose of getting rid of an obnoxious checkweigher. It was suggested in the case of *Whitehead* v. *Holdsworth* (1) that the mine had been closed and notices had been given for that purpose to the workmen. Then the Act of 1894 was passed, and that strengthened the law. The section of that Act is rather curiously worded. It does not in terms prohibit anything, but it makes certain acts offences under the main Act of 1887. [His Lordship read the section.] Now does that section in terms apply to the position of the plaintiff on July 2, 1921 ? I think it does not. It is quite clear that the contracts of the workmen were terminated because of the national stoppage, which lasted for three months, and not for any other reason. After the national stoppage fresh contracts had to be signed by the men. In my judgment the terms of this Act apply to a mine as a going concern. They may apply if the owner of a mine, for the purpose only of getting rid of a checkweigher, gives notices of dismissal and puts an end to the organisation of the men temporarily, intending to enter into new contracts with them at once and only to get a fresh checkweigher. The colliery owner would then be attempting by giving notices of dismissal to interfere with the appointment of the checkweigher. But I do not see how this Act can be treated as applying when the organisation has ceased to function and there are no contracts with the men, no relationship subsisting between them and the owners, and no checkweigher. The Act, in my judgment, does not apply to a case of this sort.

When in July, 1921, Sir David Llewellyn made his announcement of the terms upon which he was going to reopen the mine, it was not in my judgment his object to get the plaintiff out of his position as checkweigher. I think Sir David Llewellyn's immediate object was to displace the plaintiff from being the leader of the men able to exercise influence over the men, or some of them ; and the question in regard to his position as checkweigher was a secondary matter altogether. No doubt the plaintiff's position as checkweigher

(1) 4 Ex. D. 13.

was bound up to a certain extent with his position as leader of the men, because as checkweigher he was always at the mouth of the level. There is no reason to think that the plaintiff checked the minerals gotten by the men wrongly or did anything of that kind. The real objection of the owners to the plaintiff was that they thought that he, being the leader of the men, influenced them and told them not to give a fair day's work in return for their wages. It was that to which Sir David Llewellyn was objecting.

If my interpretation of the Act be correct, it follows that on July 2 Sir David Llewellyn did nothing which was in contravention of the Act. If that be so, it follows that he never did anything in contravention of the Act, because I have found already that after July 2 the initiative ceased to lie with Sir David and lay with the men, and the men alone. It may be that the men had some recollection of the attitude taken up before by Sir David Llewellyn—I should assume they had —but that does not make what he did an illegal act.

For these reasons it appears to me that the claim of the plaintiff founded on the Act of 1894 fails.

A further question has been raised whether under the Act of 1894 there is any remedy given to the plaintiff except the remedy expressly prescribed. I think, in the circumstances, seeing that the question here is mainly one of fact, and that I have come to a decision on the facts, I had better leave that question undealt with.

I hold therefore that the management have neither under the general law, nor under the law particularly relating to checkweighers, committed any actionable wrong at all.

The result therefore is that this action must be dismissed with costs.

Solicitors: *Smith, Rundell, Dods & Bockett, for Morgan Bruce & Nicholas, Pontypridd; Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

H. C. G.

RUSSELL J.
1923
July 3, 4.

DEY *v.* RUBBER AND MERCANTILE CORPORATION, LIMITED.

[1922. R. 2720.]

Company—Scheme of Arrangement—Sanction of Court—Debentures allotted but not delivered—Issue—Right to vote at Debenture Holders' Meeting—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120.

A scheme of arrangement, under s. 120 of the Companies (Consolidation) Act, 1908, sanctioned by the Court and declared binding on the company and its creditors, provided that the company should create a series of debentures and that all fully secured creditors of the company should accept debentures in return for their securities :—

Held, that creditors to whom letters of allotment had been sent, whose names were inscribed in the register of debenture holders, were entitled to vote at a debenture holders' meeting, and that the right to vote was not confined to debenture holders to whom debentures, sealed by the company, had been delivered. The issue of the letters of allotment and the obligation on the company to hand over the debentures when called upon, coupled with the obligation on the creditors to receive the debentures, constituted an issue of debentures.

WITNESS ACTION.

This was a debenture holder's action in which the usual relief was asked for. The defendant company in 1921 proposed a scheme of arrangement, under s. 120 of the Companies (Consolidation) Act, 1908, which the Court by order sanctioned and declared to be binding on the company and on all the creditors of the company. The scheme provided (i.) that the company should create an issue of 2000 debentures of 100*l.* each, carrying interest at the rate of 10 per cent. per annum payable on the first day of March and the first day of September in each year, to be redeemed as therein mentioned, and secured by a floating charge on the assets both present and future of the company; (ii.) that all fully secured creditors as therein defined should accept debentures of the company taken at par for the multiple of 100*l.* next below the amounts of their securities, the balance to be paid in cash, and should surrender their securities to the company. Pursuant to the order and scheme the company created an issue of 2000 debentures of 100*l.* each, and, on December 31,

1921, allotted 1452 among the creditors of the company. The plaintiff was a secured creditor of the company for 12,700*l.* On August 2, 1922, the company issued to the plaintiff, who had surrendered his securities to the company, 127 debentures of 100*l.* each. A memorandum indorsed on the debentures stated that whatever the date of the debenture, interest began to accrue from September 1, 1921, and first became payable on March 1, 1922. Each debenture was issued subject to conditions indorsed thereon. By condition 1 the debentures of the series were all to rank pari passu in point of charge, such charge to be a floating security. By condition 11 the principal moneys became immediately payable if the company made default in the payment of interest for six months and the registered holder gave notice to the company calling in the principal money. Condition 13 provided: "A meeting of the debenture holders shall have power by extraordinary resolution to sanction any modification or compromise of the rights of the holders of debentures of this series against the company or against its property, including power to accept any other property or securities instead of these debentures . . . . and in particular . . . . any shares of this company, and an agreement so sanctioned shall be binding on all the holders of debentures of this series and notice thereof shall be given to each holder, who shall be bound to produce his debentures to the company and to permit a note of such agreement and the sanction thereof to be indorsed thereon." By condition 14 the directors of the company might, whenever they thought fit, convene a general meeting of the debenture holders, the quorum to be two-thirds of the issued debentures. On November 16, 1922, the company having made default for six months in the payment of interest, the plaintiff served notice on the company calling in the principal sum of 12,700*l.* secured by his debentures, and, on November 17, issued a writ, on behalf of himself and the other debenture holders of the company, claiming an account and the usual relief. On November 29, 1922, the company convened a general meeting of debenture holders at which the following extraordinary resolutions were passed:

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That the payment of interest already accrued or hereafter to accrue due on the principal moneys secured by the debentures be and the same is hereby postponed until the first day of September, 1926.

That this meeting hereby agrees, on behalf of all the holders of the debentures issued by the company, and so as to bind all such holders, to accept at any time before March 1, 1923, A shares of the company credited as fully paid up at the rate of 120 A shares of 1*l.* each for every 100*l.* of principal moneys secured by the debentures in exchange for the debentures, and in full discharge and satisfaction for all principal moneys and interest due or to become due upon such debentures.

At this date the company had allotted 1732 debentures. The resolutions were carried by 1058 votes against 127, the plaintiff being the only person to vote against the resolutions. The plaintiff was the only person to whom debentures had actually been issued, but the others who voted at the meeting had received letters of allotment, and their names had been inserted in the register of debenture holders.

Bennett K.C. for the plaintiff. An agreement to issue debentures does not constitute an issue in a legal sense, it merely gives a right to call for an issue. Those who voted in favour of the resolutions of November 29, 1922, never exercised that right and therefore were not debenture holders within the meaning of condition 13, and were not entitled to vote. It follows that no valid resolutions were passed approving an agreement which modified the rights of the debenture holders, and the plaintiff is therefore entitled to the relief claimed.

It is said that there was a binding agreement between the company and the persons whose names were on the register of debenture holders to allot them debentures, and that therefore they are entitled to be regarded in equity as holders of debentures of this issue. If there had been an application for debentures, followed by an allotment and notice of that allotment to the applicants, there would have been a contract, but there was no offer here by the creditors to take

debentures in this particular form, and, as they had not received the instruments which indicated their rights, it cannot be said there was a contract in the terms of the instrument—namely, the debenture.

Preston K.C. and *E. J. Heckscher* for the defendants. Those who voted in favour of the resolutions of November 29, 1922, had received letters of allotment and their names had been inserted in the register of debenture holders. It is not necessary that debentures under the seal of the company should be issued to them before they can exercise the rights of debenture holders. Equity regards as done that which ought to be done. The order of the Court sanctioning the scheme declared it to be binding on the company and on the creditors of the company. The scheme and the order, apart from the issue of sealed debentures, amount to an agreement to give a floating charge on the property of the company, and those who received letters of allotment and whose names were on the register of debenture holders were equitable debenture holders and therefore entitled to vote: *Levy* v. *Abercorris Slate and Slab Co.* (1); *In re Perth Electric Tramways* (2); and *In re Queensland Land and Coal Co.* (3)

Russell J. If the resolutions passed at the debenture holders' meeting of November 29, 1922, were valid the plaintiff is bound by them and he is not entitled to the relief for which he asks. It was said on behalf of the plaintiff that he was the only debenture holder within the meaning of condition 13 who was present at the meeting because he was the only person to whom debentures, sealed by the company, had been issued, and that therefore no resolution approving of an agreement to modify the rights of the debenture holders has been passed. When the Court made the order sanctioning the scheme it declared the scheme to be binding both on the creditors of the company and on the company. The company duly allotted the debentures required to satisfy its creditors, notices of the allotment

(1) (1887) 37 Ch. D. 260. (2) [1906] 2 Ch. 216.
(3) [1894] 3 Ch. 181.

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were sent out to the allottees, and their names were inserted in the register of debenture holders. As soon as the order of the Court sanctioning the scheme was made there was an obligation on the company to deliver the sealed debentures, and an obligation on the individual creditor to receive them. A person who is entitled to call for debentures and who is bound to accept them, to whom they have been allotted, and whose name is on the register of debenture holders, is a debenture holder within condition 13. The issue of the letters of allotment and the existence of the obligation to hand over the debentures, coupled with the obligation to receive them, constitute, in my opinion, the issue of the debentures within the meaning of the conditions attached to them. Although the sealing of the debentures was delayed the rights of the allottees are the same as if sealed debentures had been actually handed over; they are debenture holders in equity and, as such, entitled to the rights of debenture holders. The case is analogous to *Levy* v. *Abercorris Slate and Slab Co.* (1), where Chitty J. held that any document which either created a debt or acknowledged it was a debenture, and that accordingly a document containing a contract to give a charge on the goods, chattels, and effects of a company, which in equity was a charge, was a debenture, and pointed out that the word "issue" was a mercantile and not a technical term. The same view was taken by Swinfen Eady J. in *In re Perth Electric Tramways.* (2)

The resolutions were therefore validly passed, were binding on the plaintiff, and the action must be dismissed with costs.

Solicitors: *Bono & Nimmo; Jenkins, Baker & Co.*

(1) 37 Ch. D. 260, 264.

(2) [1906] 2 Ch. 216.

J. B. B. M.

In re EYRE-WILLIAMS.

WILLIAMS *v.* WILLIAMS.

ROMER J.
1923
March 20, 21.

[1919. E. 324.]

Statute of Limitations—Constructive Trustee—Receipt of settled Moneys by Settlor—Conversion to his own Use—Liability of his Estate to refund—Wife restrained from Anticipation — Acquiescence while Interest in Reversion.

The testator, who was entitled to a mortgage debt vested in a trustee for him, assigned the same to the trustees of his marriage settlement in 1886 upon trusts under which he took the first life interest, and his wife a life interest after his death, subject to a restraint upon anticipation, with an ultimate trust in default of children, as happened, for the testator absolutely. The trustee of the mortgage debt was neither a party to, nor informed of, the settlement. In 1887 the mortgage money was paid to the testator, who never accounted for it to the settlement trustees. He died in 1916, and the trustees and widow now claimed the mortgage moneys :—

Held, that the testator was a constructive trustee who had constituted himself such by receiving trust property with the knowledge that it was trust property and that the persons representing his estate were not entitled to avail themselves, by analogy, of the Statute of Limitations, but must make good the mortgage money to the trustees of the settlement.

Soar v. *Ashwell* [1893] 2 Q. B. 390 and *In re Dixon* [1900] 2 Ch. 561 applied.

Held, further, that no acquiescence on the part of the wife while she was restrained from anticipation could prejudicially affect her claim.

Adjourned Summons with witnesses.

The following statement of facts is taken from his Lordship's considered judgment : " In this case there was a mortgage made on September 1, 1884, to secure the repayment of a sum of 5400*l.* to Sir Hartley Williams, the mortgage money being secured upon certain freehold premises at Melbourne, Australia. That mortgage was held by Sir Hartley Williams as trustee for Mr. Edward Eyre-Williams, the testator. By a settlement dated July 28, 1886, and executed on his marriage with the defendant, Mrs. Eyre-Williams, the testator purported to assign 5000*l.* part of that mortgage debt and the securities for the same to the

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trustees of that settlement upon trusts under which he, the testator, became entitled to the first life interest, and subject to that Mrs. Eyre-Williams was entitled to a life interest with a restraint on anticipation, and subject to those life interests the mortgage was to be held on trust for the children of the marriage, of whom there were none, and in default of children there was a trust for the testator absolutely. Sir Hartley Williams did not join in the settlement and so the legal interest in the mortgage property and in the 5000*l.* mortgage debt was not assigned to the trustees, but the whole equitable interest of the testator was so assigned. By the year 1887, 400*l.* of that mortgage had been paid off, leaving the 5000*l.*, the subject matter of the settlement, still due; nothing turns upon that 400*l.* In 1887 the whole of the 5000*l.*, together with a sum of 300*l.* representing unpaid interest and certain penalties, the nature of which I have not been acquainted with, were paid off by the mortgagor to the mortgagee. Sir Hartley Williams as mortgagee instructed the firm of Messrs. Blake & Riggall, who are solicitors in Australia, to receive this sum on his behalf when paid off by the mortgagor and to transmit that sum to, or to hold that sum for the benefit of, the testator. It is quite clear that Sir Hartley Williams in giving those instructions had not been made acquainted with the existence of the settlement of 1886. Messrs. Blake & Riggall accordingly received the sum of 5300*l.* and invested it in various investments in Australia, but in pursuance of instructions given to them by the testator they subsequently realised those investments and the whole of the proceeds was transmitted by them to the testator's account in this country with Messrs. Cox & Co. There is no doubt that in this way the whole of the 5000*l.* mortgage moneys that had been settled by the settlement of 1886 came into the hands of the testator. That they came into his hands with full knowledge on his part of the fact that they were affected by trusts declared by the settlement is sufficiently obvious.

"The testator died on September 26, 1916, and it was not until that date that the life interest of Mrs. Eyre-Williams

under the settlement came into operation. Up to that time her interests were reversionary and affected by the restraint on anticipation. After the testator's death inquiries were set on foot to ascertain what had happened to the 5000*l.* mortgage moneys, and the facts that I have already stated were not fully ascertained until quite recently. Meanwhile new trustees of the settlement had been appointed from time to time, and on the occasion of each appointment there was a recital to the effect that the 5000*l.* mortgage had never been assigned to the trustees."

Dighton Pollock for the trustees of the will.

Hughes K.C. and *Warwick Draper* for a defendant beneficiary. Under the old law time was no bar in the case of an express trust, but it was otherwise in the case of a constructive trust, to which Courts of equity applied by analogy the Statute of Limitations.

The testator was not an express trustee. The principles applicable to the case of a constructive trustee appear from the judgments in *Petre* v. *Petre* (1); *Cunningham* v. *Foot* (2); *Sands to Thompson* (3); and *Soar* v. *Ashwell* (4); and, applying those principles, we submit that the testator was not a trustee or a person claiming under a trustee, and that even if he were a constructive trustee he would be entitled by analogy to the benefit of the Statute of Limitations: Carson's Real Property Statutes, 2nd ed., p. 250; Darby and Bosanquet's Statutes of Limitation, 2nd ed., p. 247. When he received the mortgage money in 1887 the trustees might have sued him for it, but with the full knowledge of himself and his wife the money was left outstanding. That was the position, and the only action which could have been taken was one by the trustees of the settlement and necessarily in their names. The wife's interest was reversionary during her coverture and fell into possession in 1916, but whether she could have sued in the name of the trustees or not, the trustees were in existence the whole of the time and any action by them would have

(1) (1853) 1 Drew. 371, 393.
(2) (1878) 3 App. Cas. 974, 984.
(3) (1883) 22 Ch. D. 614.
(4) [1893] 2 Q. B. 390, 400.

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benefited her alone. Both she and her husband deliberately abstained from enforcing the assignment, and the trustees ought not now to be allowed to enforce it. The testator was never a trustee in any sense of the word or anything more than the person to be sued by the trustees.

Cunliffe K.C. and *Israel* for the defendant residuary legatees. We adopt the same argument. The wife with full knowledge concurred in all that was done, and whatever effect her restraint upon anticipation might have upon her acquiescence during her coverture, that ceased in 1916, and ever since she has continued her acquiescence.

Manning K.C. and *Swords* for the defendant Mrs. Eyre-Williams. There was nothing in any of the appointments of new trustees to affect this defendant with knowledge that the moneys had come into her husband's hands, and the parties have all along treated this money as being still subject to the trusts of the settlement. Moreover, owing to the restraint upon anticipation, she was not in a position to bind herself by acquiescence even if she had known the facts.

In *Ernest* v. *Croysdill* (1) Turner L.J. recognizes the principle of equity that where a man receives trust money with express notice of the trust he is, in equity, in the position of an express trustee; and he was so regarded in *In re Dixon* (2) for the purpose of deciding whether or not he was entitled to the benefit of the Statute of Limitations. He comes within Bowen L.J.'s third exception in *Soar* v. *Ashwell.* (3) *Coxwell* v. *Franklinski* (4) is another clear decision in point.

The testator was in the position of an express trustee, and was not merely a constructive trustee, and neither the Trustee Act, 1888, nor any other Statute of Limitation applies.

Swords for the trustees of the settlement.

Hughes K.C. in reply.

(1) (1860) 2 D. F. & J. 175, 198.
(2) [1900] 2 Ch. 561.
(3) [1893] 2 Q. B. 390, 396.
(4) (1864) 11 L. T. 153.

ROMER J. [after stating the facts continued:] This summons has been issued for the purpose of determining certain questions that arise in the administration of the testator's estate, but by the consent of all parties it has been arranged that the question whether the estate of the testator is liable to the trustees of that settlement to replace the mortgage moneys so received by him shall also be determined on the summons, though every defence has, by express arrangement between the parties, been left open to the persons representing the estate of the testator. Now one of the defences, in fact the only defence, with which I have to deal is the defence of the Statute of Limitations. It is said that the testator received these moneys in the year 1887 and that it is far too late now for the trustees of the settlement to recover the moneys from him or from his estate. Now there is, of course, no express Statute of Limitations which would apply to the claim of the trustees to recover these moneys from the estate of the testator, unless it be the Trustee Act of 1888. Those who are representing the estate of the testator could not, however, rely upon the provisions of that statute, having regard to the fact that the moneys which the trustees of the settlement are seeking to recover were moneys which were received by the testator and applied to his own use. But although no Statute of Limitations is applicable, it has been the practice of the Courts of equity for a very long time to apply the Statute of Limitations by analogy to various purely equitable demands; though an exception has always been made in the case of actions brought against express trustees. Where a defendant against whom the action is brought to recover trust moneys is an express trustee, the Courts of equity always refused to allow the defendant to avail himself by way of analogy of the Statute of Limitations, and this exception was ultimately given statutory recognition and force by s. 25, sub-s. 2, of the Judicature Act, 1873. The exception in the case of express trustees has, however, in certain cases been extended by the Courts of equity to constructive trustees. In the present case it cannot be contended that the testator was ever constituted an express

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trustee, but without any question he did become a constructive trustee of the mortgage moneys which he received from Australia. What therefore I have to determine in this case is whether a constructive trustee who constitutes himself such by receiving trust property with the knowledge that it is trust property is, in an action brought by the equitable owners of that property to recover it, entitled to avail himself, by analogy, of the Statute of Limitations.

Now, the cases to which I have already referred, cases in which the Courts of equity have for this purpose treated certain constructive trustees as being in the position of express trustees, have been summarized by the Court of Appeal in the case of *Soar* v. *Ashwell*. (1) Lord Esher M.R. after dealing with the case of a person who is not originally an express trustee but who has assumed, either with or without consent, to act as a trustee, and after pointing out that that is one of the cases in which the Court of equity treats the constructive trustee as being an express trustee, says this: "There is another recognised state of circumstances in which a person not nominated a trustee may be bound to liability as if he were a nominated trustee, namely, where he has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property. Such a person will be treated by a Court of equity as if he were an express trustee of an express trust." Kay L.J., after referring to a number of cases in which the question had cropped up and been decided, says this (2): "The result seems to be that there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations cannot be set up as a defence. Amongst these are the case where a stranger to the trust has assumed to act and has acted as a trustee, and the case where a stranger has concurred with the trustee in committing a breach of trust, and has taken possession of the trust property, knowing that it was trust property, and has not duly discharged himself of it by handing it over to the proper trustees or to the persons absolutely

(1) [1893] 2 Q. B. 390, 394. (2) [1893] 2 Q. B. 405.

entitled to it." It will be observed that he mentions practically the same two exceptions as are mentioned by Lord Esher M.R., but neither learned judge said or, as I think, intended to say that those two were the only exceptions, the only two classes of case in which the Court of equity would treat a constructive trustee for the purpose of the Statute of Limitations as an express trustee. Bowen L.J. gave a more exhaustive list of the classes of case to which I have referred. He says (1): "First, the doctrine that time is no bar in the case of express trusts has been extended to cases where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust"; that is the first class of case to which both Lord Esher and Kay L.J. referred. Then he says: "Secondly, the rule as to limitations of time which has been laid down in reference to express trusts has also been thought appropriate to cases where a stranger participates in the fraud of a trustee." He there mentions the second class of case referred to by Lord Esher M.R. and Kay L.J., but then Bowen L.J. mentions a third class. He says: "Thirdly, a similar extension of the doctrine has been acted on in a case where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant," and he cites as the authority for that the case of *Lee* v. *Sankey*. (2) Bowen L.J. clearly lays it down that a man who receives trust property with knowledge that it is trust property, though without the knowledge of the trustee, will be treated by the Court of equity, for the purposes of ascertaining whether the Statute of Limitations is available to him or not, exactly as it would treat an express trustee. Indeed, personally I find it very difficult to understand why where a man receives and misappropriates trust money with knowledge of the trust there should be any difference in favour of the man who does so without the knowledge of the trustee as compared with the man who does so with the knowledge of the trustee. In the first case he is doing a wrong both to the trustee and

(1) [1893] 2 Q. B. 396. (2) [1872] L. R. 15 Eq. 204.

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to the cestui que trust, in the second case he is doing a wrong to the cestui que trust only, and one would have thought that the case of the first man was at any rate as bad as the case of the second.

Of the other cases cited to me as authorities for the proposition that a person who receives trust money with knowledge that it is trust money is, for the purposes with which I am dealing, in the same position as an express trustee, it is I think only necessary to refer to *In re Dixon* (1), a decision of the Court of Appeal. That was a case in which the trustees had, as the Court held, lent money to the husband, who was a beneficiary under the trust, in pursuance of a power contained in the settlement, so that there was no question there, at any rate, of the trustees having committed any breach of trust in so doing. The husband, having received the money, gave a bond for its repayment, and ultimately an action was brought, after the death, I think, of the husband, upon that bond, and the Statute of Limitations was pleaded. It was held by the whole Court that the Statute of Limitations was not open to the defendants in the case, the representatives of the husband's estate, because he must be deemed to have paid the interest on the bond during his life and handed it to his wife, who I think had the first life interest under the settlement; so that they held the Statute of Limitations was not open to the representatives of the husband's estate. But Webster M.R. dealt with the case also in this way. He considered the question whether, apart altogether from this payment of interest by the husband, the statute was available to his representatives, having regard to the fact that the husband was a constructive trustee of the moneys he had received. He says this (2): "We were pressed as to the distinction between express trustees and implied or constructive trustees. In *Soar* v. *Ashwell* (3) Bowen L.J., after enumerating two classes of persons who are subject to the rule that time is no bar in the case of express

(1) [1900] 2 Ch. 561. (2) [1900] 2 Ch. 574.
(3) [1893] 2 Q. B. 390, 396.

trusts, states a third class as follows." Then he reads the passage which I have already read from *Soar* v. *Ashwell* (1), and he treated that statement as being a correct statement of the law.

In those circumstances, it appears to me that I am not at liberty to say that the Statute of Limitations is available to the representatives of the testator's estate. I agree that he was not an express trustee; he was only a constructive trustee; but, being a constructive trustee, he was a constructive trustee of the kind that, according to the authorities that I have referred to, is not entitled to rely upon the Statute of Limitations.

Then it was said that the trustees here can only be treated as suing for the benefit of Mrs. Eyre-Williams, her life interest being the only trust now subsisting under the settlement other than the trust for the testator's estate absolutely, and it was said that, having regard to the fact that she knew and concurred in the application of these funds by her husband for his own benefit, this action ought not to be allowed to succeed. There are, however, I feel, obvious difficulties in the way of giving effect to that contention. I doubt whether on the present materials, without cross-examination, I should be justified in holding that she did know of and concur in the application of these funds by the husband; but, even if she did, at the time she concurred in it she was restrained from anticipation. It would, I think, be impossible for the Court in those circumstances to say, after the death of the husband, that by reason of the wife's concurrence she, or rather the trustees for her, are debarred from recovering the money. So to hold, I think, would be to disregard the restraint on anticipation altogether, and to introduce a method by which it would be only too easy for a married woman to rid herself of a restraint on anticipation. Her life interest did not arise until 1916, and I cannot see how any acquiescence by her after that date, being acquiescence if it existed lasting for less than the period of six years before the proceedings were instituted, can be

(1) [1893] 2 Q. B. 390, 396.

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held in any way to preclude her from insisting on the claim that is now made on her behalf.

Under those circumstances I must answer the question that is put to me by the summons by declaring that the testator's estate is liable to make good to the trustees of the settlement the sum of 5000*l.*

Solicitors for the plaintiffs and residuary legatees : *Cohen & Cohen.*

Solicitors for defendant beneficiary : *Peacock & Goddard, for Mullings, Ellett & Co., Cirencester.*

Solicitors for widow and settlement trustees : *J. J. Edwards & Co.*

R. M.

EVE J. 1923 *June* 12, 13, 14 ; *July* 31.

ROTHSCHILD *v.* ADMINISTRATOR OF AUSTRIAN PROPERTY.

[1921. R. 3202.]

Alien Enemy—"National of the former Austrian Empire"—Acquisition of new Nationality after Fall of Austrian Empire, but before Treaty of Peace came into Force—Charge on Property in United Kingdom—Treaty of Peace with Austria, s. IV., arts. 230, 249 (*b*) *and Annex—Treaty of Peace (Austria) Order,* 1920, *s.* 1, *sub-s. ix.*

An Austrian granted citizenship of the Czecho-Slovakian Republic after the disruption of the Austrian Empire, but before July 16, 1920, the date when the Treaty of Peace between the Allied and Associated Powers and Austria came into force, remains subject to the charge created by art. 249 (*b*) of the Treaty and s. 1, sub-s. IX., of the Treaty of Peace (Austria) Order, 1920, notwithstanding the provisions of art. 230 of the Treaty.

THE plaintiff was born at Vienna on March 6, 1884, and prior to July 7, 1920, was a subject of the former Austro-Hungarian Monarchy. By a decree made on July 9, 1920, by the Political Administration of the District of Moravia Ostrava in Bruo, citizenship of the Czecho-Slovakian Republic was granted to the plaintiff, and he contended that as from that date he became naturalized as a citizen of the Czecho-Slovakian Republic, and ceased to be an Austrian national.

The plaintiff continued to reside in Vienna after July 9, 1920. The defendant, the Administrator of Austrian Property, claimed that by virtue of art. 249 (*b*) of s. IV. and para. 4 of the annex to s. IV. of the Treaty of Peace between the Allied and Associated Powers and Austria (1), which was signed on September 10, 1919, and by virtue of s. 1, sub-s. IX., of the Treaty of Peace (Austria) Order, 1920 (2), all the property of the plaintiff within the United Kingdom on the date when the Treaty took effect was subject to the charge created by the Order. The Order came into operation as from July 16, 1920, the date when the Treaty came into force. In this action the plaintiff claimed a declaration that no part of his property within the United Kingdom was subject to or charged by the Treaty or Order.

Clauson K.C., *Bischoff* and *Eric Dawes* for the plaintiff. On July 9, 1920, the plaintiff obtained a grant of Czecho-Slovakian nationality and thereby lost his Austrian nationality, and cannot now be treated as an alien enemy. Whether a person is a national of a country depends upon the municipal law of that country: *Stoeck* v. *Public Trustee.* (3) Under art. 230 of the Treaty of Peace with Austria (4) there can be

(1) Treaty of Peace with Austria, art. 249 (*b*) of s. IV.: "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Austrian Empire, ... and are within the territories . . . . of those Powers."

Para. 4 of the annex to s. IV.: "All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Associated Power and the net proceeds of their sale, ... may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power . . . . in territory of the former Austrian Empire, or debts owing to them by Austrian nationals. . . . ."

(2) Treaty of Peace (Austria) Order, 1920, s. 1, sub-s. ix.: "All property, rights and interests within His Majesty's Dominions or Protectorates belonging to nationals of the former Austrian Empire at the date when the Treaty came into force . . . . and the net proceeds of their sale, ... are hereby charged."

(3) [1921] 2 Ch. 67, 82.

(4) Treaty of Peace with Austria, art. 230: "Austria undertakes to recognise any new nationality which has been or may be acquired by her nationals under the laws of the Allied

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no doubt that on July 9, 1920, the plaintiff severed his allegiance to Austria, and became a citizen of the Czecho-Slovakian Republic. The phrase "nationals of the former Austrian Empire" in art. 249 (*b*) does not apply to those who have ceased to be nationals of the former empire and have become citizens of the Czecho-Slovakian State. When the phrase is intended to apply to them, it is specifically so stated, as in art. 263. The plaintiff is not subject to the charge created by the Treaty and the Order, and he is entitled to the declaration asked for.

Sir Douglas Hogg A.-G., *Sir Thomas Inskip S.-G.* and *Gavin Simonds* for the defendant. The plaintiff's contention is that on July 9, 1920, he acquired Czecho-Slovakian nationality, but according to Austrian law he did not lose his Austrian nationality. If he were of Austrian nationality on July 16, nothing that Austria could do subsequently would remove the charge. Even if Austria could alter the charge, it is doubtful whether, taking into consideration s. 6 of Part III. of the Treaty, that would help him. In arts. 228, 229, and 230, Austria undertakes to recognize new nationalities, formerly parts of the Austrian Empire, but that does not help the plaintiff.

Sect. 2 of the Treaty of Peace Order does not define those who are Austrian nationals, but it does define those who are not. Austria itself and Czecho-Slovakia were part of the Austrian Empire. "Nationals of the former Austrian Empire" might mean those who were nationals of Austria proper, or it might mean nationals of territory that formed part of the Austrian Empire. When the Treaty means people who belong to Austria proper it uses appropriate language. Art. 45 shows the distinction in language. "Nationals of the former Austrian Empire" in art. 249 (*b*) must mean nationals of all the territory that belonged to the Austrian Empire.

and Associated Powers, and in accordance with the decisions of the competent authorities of these Powers pursuant to naturalisation laws or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin."

This is clearly shown by the language used in art. 202. The Treaty all through divides the nationals of the former Austrian Empire into two classes, those who remain nationals of Austria after the Treaty and those who have become nationals of other states. This is shown in para. 2 of the annex to s. 4 of ch. 5 of Part X. There is no third class. The plaintiff is clearly subject to the charge.

Clauson K.C. in reply. In art. 230 Austria recognizes that the person who has acquired Czecho-Slovakian nationality has lost his Austrian nationality, and therefore it cannot be said that the plaintiff was an Austrian after July 9, 1920. He could not be compensated except by Austria, and Austria only compensates her own nationals.

Cur. adv. vult.

July 31. EVE J. [after stating the facts and reading art. 249 (*b*) of s. IV. of the Treaty of Peace with Austria, para. 4 of the annex to s. 4, and s. 1, sub-s. IX., of the Treaty of Peace (Austria) Order, 1920, delivered the following written judgment]. The Order came into operation as from July 16, 1920, the date when the Treaty came into force, and the first question I have to decide is whether the plaintiff has proved that prior to that date he had acquired a new and abandoned his old nationality.

In proof of these alleged facts the plaintiff by his counsel tendered various documents, which I need not enumerate in detail, but which included documents certified to be true copies of resolutions and certificates extracted from the records of proceedings of certain authorities in Czecho-Slovakia granting him nationality of that State on July 9, 1920, and a certificate issued by the Federal Chancery (Home Affairs) in Vienna to the effect that by the acquisition of that nationality he had ipso facto lost his Austrian nationality, but upon objection being raised to the admissibility of these documents as proof of the several matters therein respectively referred to I upheld the objection, and in ordinary circumstances the hearing must thereupon have been adjourned upon equitable terms to enable the plaintiff to adduce competent

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testimony in support of his case. But in order to save time and expense, it was arranged that the evidence of the witnesses who were in Court to depose to the law of Austria and Czecho-Slovakia should be taken, and in particular as affecting the point whether the plaintiff, assuming him to have acquired Czecho-Slovakian nationality on the date alleged, had thereby lost his Austrian nationality, having regard to the admission that he has never removed from Vienna and has continued since July 9 to reside in that city.

The plaintiff's advisers recognized that this evidence when given established that the acquisition of a foreign nationality does not according to Austrian law operate to determine the Austrian nationality unless accompanied by removal from Austria; and, again by arrangement between the parties, the case thereafter proceeded on the footing that the plaintiff at some stage, if it should turn out to be material, could prove that he did in fact acquire Czecho-Slovakian nationality early in July, 1920, although he did not thereby lose his Austrian nationality.

Upon this footing the plaintiff, admitting that he could not claim to be included in any class of persons specifically mentioned in the concluding paragraph of art. 249 (*b*), based his whole case on art. 230 of the Treaty.

There, says the plaintiff, is an article which exactly fits my case. I have, on the hypothesis upon which the case is now proceeding, in fact acquired a new nationality under the laws of an Associated Power, and in consequence Austria is bound to regard me as having in all respects abandoned my Austrian nationality.

This submission involves the assertion of the existence of a class of individuals exempted from the operation of art. 249 (*b*), whose existence is not dealt with or even mentioned in the section of the Treaty containing the clauses relating to nationality, or in the category of exempted persons contained in art. 249 (*b*) itself. These omissions, coupled with the fact that art. 230 is to be found in the part of the Treaty headed "Economic Clauses" and in a fasciculus of articles regulating Austria's attitude towards nationals of

Allied and Associated Powers in commercial relations, give rise to a serious doubt whether the article can—or was ever intended to—have the result contended for, and call for a careful examination of the relevant provisions of the Treaty.

The first are to be found in s. VI. of Part III. under the heading "Clauses relating to Nationality." By these clauses transfer of nationality is provided for in the following cases, and no others :—

(1.) Persons possessing rights of citizenship in territory which formed part of the former Austro-Hungarian Monarchy are ipso facto to obtain the nationality of the State exercising sovereignty over such territory to the exclusion of Austrian nationality, provided in the case of territory transferred to Italy, they were born in such territory or did not acquire their rights of citizenship in such territory after May 24, 1915, or only by reason of their official position, and provided also that persons who acquired rights of citizenship after January 1, 1910, in territory transferred under the Treaty to the Serb-Croat-Slovene State, or to the Czecho-Slovakian State, are not to acquire Serb-Croat-Slovene or Czecho-Slovakian nationality without a permit from the Serb-Croat-Slovene State or the Czecho-Slovakian State respectively, and if such permit is not applied for, or is refused, the persons concerned will obtain ipso facto the nationality of the State exercising sovereignty over the territory in which they previously possessed rights of citizenship.

(2.) Persons possessing rights of citizenship in territory transferred to Italy who were not born in such territory, persons who acquired their rights of citizenship in such territory after May 24, 1915, or who acquired them only by reason of their official position, as also persons who formerly possessed, or whose father, or mother, if the father is unknown, possessed rights of citizenship in such territories, and persons who served in the Italian Army during the war may, if not refused by the competent Italian authority, and on complying with certain conditions, one of which involves the transfer of their place of residence to such territory, claim Italian nationality.

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(3.) Juridical persons established in the territories transferred to Italy are to be considered Italians if recognized as such by the Italian administrative authorities, or by an Italian judicial decision; and

(4.) Persons over eighteen years of age losing their Austrian nationality and obtaining ipso facto a new nationality—that is to say, persons who come within class 1 above mentioned—are to be entitled within one year from the coming into force of the Treaty to opt for the nationality of the State in which they possessed rights of citizenship before acquiring such right in the territory transferred, and if they exercise this right to opt they must within the succeeding twelve months transfer their place of residence to the State for which they have opted.

It will be gathered from this summary that in substance transfer of nationality involving loss of Austrian nationality was restricted to persons possessing rights of citizenship in transferred territories. A conditional option to avert this automatic transfer and loss was provided, and certain exceptional cases relating to territory transferred to Italy were dealt with, but did the framers of the Treaty intend to provide that any one acquiring—however recently before the Treaty came into operation—the nationality of a State exercising sovereignty over transferred territory should without the possession of any rights of citizenship in such territory obtain the new nationality to the exclusion of his Austrian nationality? They not only have not said so, but by what they have said they appear to me to have negatived any such intention.

The other relevant provisions are contained in the clause of exception with which para. (*b*) of art. 249 concludes. In that clause is to be found an enumeration of persons who are not to be considered as nationals of the former Austrian Empire within the meaning of the paragraph. They are strictly limited to the same persons as are capable under the clauses relating to nationality of obtaining a new nationality to the exclusion of Austrian nationality, and again it is difficult to believe that the framers of that clause could ever have

contemplated the existence of a class of persons who had acquired—not in virtue of any previous right of citizenship—a new nationality and, resting themselves on art. 230, could successfully claim that they had thereby ceased to be nationals of the former Austrian Empire within the meaning of the paragraph.

The conclusion based upon a careful scrutiny of the relevant provisions of the Treaty with which I have dealt is, I think, irresistible that art. 230 ought not to be so construed as to throw doubt on the exhaustive character of these provisions if any reasonable alternative presents itself. And I think such an alternative is to be found in the solution suggested by the Attorney-General.

Art. 230 is one of a series of articles incorporated in a part of the Treaty never intended to have any operative effect on questions of nationality or of the rights of the Allied Powers over enemy property under their control, but framed solely to regulate commercial relations between Austrian nationals and the nationals of the Allied and Associated Powers, and to secure that the latter should receive equality of treatment with, and should not be subjected to any greater taxation or to any more burdensome or disadvantageous prohibitions, regulations or restrictions than the former. It is not one of the sections scheduled to the Peace Treaty Order, but it undoubtedly binds Austria, and is now part of the law of Austria, having become so towards the end of July, 1920; it compels Austria to treat persons in the position of the plaintiff in the same manner as she is bound to treat nationals of the Allied and Associated Powers, and as it seems to me the concluding words of the article, whereby she undertakes to regard such persons as having in all respects severed their allegiance to their country of origin, were inserted to obviate the difficulty presented by the fact that under Austrian law a new nationality would not determine Austrian nationality without a change of residence. The result is that in my opinion the plaintiff fails in his attempt to establish exemption under art. 230, and it is not necessary further to pursue the inquiry whether in any circumstances changes in Austrian

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law, subsequent to July 16, 1920, could operate to defeat the charge which came into effect on that date.

There is, however, a further point of more general interest which has been elaborately argued, and upon which I am invited to give a decision. It raises the question what is the proper meaning to be attached to the expression "nationals of the former Austrian Empire" in the Treaty and Order? There is no general definition of the expression. Art. 263 of the Treaty uses it to designate a class of persons to be distinguished from another class designated "Austrian Nationals," and by s. 2 of the Order it is enacted that for the purposes of the provisions of s. 1—including of course sub-s. IX. thereof whereby the charge is imposed on all property, rights and interests within His Majesty's Dominions belonging to nationals of the former Austrian Empire—the expression is not to include certain persons therein more particularly specified. The persons so specified are all persons who under the articles of the Treaty relating to nationality either ipso facto on the coming into force of the Treaty acquired or under the express provisions therein contained were capable of acquiring a new nationality to the exclusion of Austrian nationality. It is not suggested that the specified exceptions include the plaintiff, and on behalf of the defendant it is contended that even on the assumption that the plaintiff did in fact acquire Czecho-Slovakian nationality early in July he is none the less a national of the former Austrian Empire for the purpose of the charge created by the Treaty and the Order. This contention is based on the submission that "nationals of the former Austrian Empire" are persons who were nationals of the Austrian Empire when there was such an Empire—that is to say, down to October 28, 1918, when the Empire ceased to exist by the deposition of the Emperor, and the disruption of the territory theretofore constituting his Empire, and that would not only appear to be the most obvious grammatical meaning of the expression, but it is the one with which the words are undoubtedly used in many parts of the Treaty: see in particular arts. 45, 94, 216, 224, 249A, 249E, 250, 258, 261 and 262, and para. 3

of annex iii. to Part VIII., and paras. 2, 4 and 13 of the annex to s. IV. of Part X.

It is, however, argued on behalf of the plaintiff that in other parts the phrase is tautologous with the words "Austrian nationals," and means persons who on the coming into force of the Treaty were nationals of the then existing Republic formerly the Austrian Empire, in other words, that the expression is restricted to nationals of the former Austrian Empire who on July 16, 1920, continued to be nationals of the Austrian Republic. I think it is the fact that there are clauses in the Treaty where the expression may be read as capable of bearing either construction, but I cannot find one where the plaintiff's construction is inevitable. Reliance is placed in support of the argument on the fact that in art. 249 (*b*), the really relevant one in this particular case, according to the French text the expressions "nationals of the former Austrian Empire" and "Austrian nationals," which admittedly only extends to nationals of the Austrian Republic, are synonymous. In para. 1 of the article the words defining the class of persons whose property is to be retained are "ressortissants de l'ancien Empire d'Autriche," and in para. 3 excepting certain persons who would but for such exception be included in the class the words are "ressortissants Autrichiens." In the English text the expression is "nationals of the former Austrian Empire" in both paragraphs. By art. 387 it is provided that in case of divergence the French text is to prevail, but this article is not scheduled to the Treaty Order, and in these circumstances I must construe the article as I find it in the English text, and without regard to the change of expression in the two paragraphs which is to be found in the French version.

Another argument advanced on behalf of the plaintiff was that the construction contended for by the defendant involves the imposition of some arbitrary date for fixing the class. This no doubt is in a sense true, inasmuch as an unlimited retrospective construction would include many present nationals of Allied and Associated Powers, a result which obviously would be absurd. Some limitation must therefore

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be imposed on the retrospective effect of the words, and working backwards from the date when the Treaty became effective the most natural date would certainly appear to be one which restricts their operation to those who at the moment of the break up of the Empire were nationals of that Empire. These constitute the class in para. 1 of art. 249 (*b*), but from that class are exempted those who can bring themselves within para. 3 and no others. I think this construction does no violence to any other article of the Treaty and is the right one.

Accordingly, even if the plaintiff did in July, 1920, acquire Czecho-Slovakian nationality he still remains a member of the class defined in para. 1 of art. 249 (*b*), and not being able to bring himself within the express exceptions under para. 3 he cannot in my opinion escape the operation of the charge from which by this action he claims to be exempted.

I think his action fails on both grounds, and must be dismissed with costs.

Solicitors for plaintiff: *Dawes & Sons.*

Solicitor for defendant: *The Solicitor to the Clearing Office.*

P. J. B.

CROSS *v.* IMPERIAL CONTINENTAL GAS ASSOCIATION.

ROMER J.

1923

April 23, 24; *May* 8.

[1923. C. 1080.]

Company—Special Acts incorporating Companies Clauses Consolidation Acts—Debenture Stock—Realized Profit on Sale of Capital Asset—Paid-up Capital intact—No Jeopardy—Distribution of Surplus Profit by Way of Dividend—Member or Debenture Stockholder not entitled to object—"Capital stock"—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 116, 121.

The compensation payable to the defendant association for the compulsory acquisition of its gas undertakings in various German towns by the German Government during the War resulted in the realization by the Association of a very considerable profit upon the book value of those undertakings, some of which profit, after writing down various assets of the association, the directors proposed to treat as profit available for paying a dividend to the members.

The defendant association was a company incorporated and regulated by a series of special Acts which incorporated the Companies Clauses Consolidation Acts, and had from time to time in exercise of the powers conferred by these Acts issued debenture stock. No interest on the debenture stock was in arrear. The proposed distribution involved no reduction of capital, and the paid-up capital of the association was intact. The plaintiff, who was both a member and a holder of debenture stock of the association, sought to restrain the payment of the proposed dividend:—

Held, (1.) that the debenture stock did not constitute a specific charge upon the German property, and no interest being in arrear, there was no debt due to the debenture stockholders, and that the plaintiff as a stockholder had no right to interfere with the ownership, possession or dominion of the association as the statutory owners and managers.

Attree v. *Hawe* (1878) 9 Ch. D. 337 applied.

(2.) That the plaintiff as a member of the association could not impeach the legality of the proposed distribution, because:—

(*a*) A company registered under the Joint Stock Companies Acts could, in the absence of special provision to the contrary, distribute a realized profit on its capital assets, and, for the present purpose, there was no substantial distinction between a company registered under those Acts and a company to which the Companies Clauses Consolidation Acts applied.

Lubbock v. *British Bank of South America* [1892] 2 Ch. 198 and *Foster* v. *New Trinidad Lake Asphalt Co.* [1901] 1 Ch. 208 applied.

Lawrence v. *West Somerset Mineral Ry. Co.* [1918] 2 Ch. 250 followed.

(*b*) In the present case the association having power under a special Act to sell any part of its undertaking and having adopted the sale of its German undertaking, that was a "transaction" within s. 116 of the Companies Clauses Consolidation Act, 1845, which,

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in the circumstances, conferred upon the association power to distribute the realized profit by way of dividend amongst its members.

In s. 121 of the Companies Clauses Consolidation Act, 1845, the prohibition against making any dividend whereby the "capital stock" of the company will be reduced refers not to capital assets generally, but to the paid-up capital of the company.

MOTION.

The following statement of facts is taken from his Lordship's considered judgment: "This is a motion by a member and debenture stockholder of the defendants, The Imperial Continental Gas Association, suing on behalf of himself and all other the members and debenture stockholders, for an injunction to restrain the defendant Association from applying a sum of 238,698*l.* odd recently received by the Association in the circumstances presently to be mentioned, or any part of that sum, in the payment of any dividend to their members without at the same time redeeming the whole of their outstanding debenture stock, or alternatively the said debenture stock to a nominal amount equal to one-fourth of the nominal amount distributed among their members.

"The relevant facts are as follows: The Imperial Continental Gas Association were established for the purpose of supplying cities, towns and places in foreign countries with gas. They were at first an unincorporated company regulated by a deed of co-partnership of the 9th March, 1826. In the year 1853 they were incorporated by Act of Parliament. That Act however was repealed by the Imperial Continental Gas Association Act, 1870, which also avoided the deed of co-partnership, and it is unnecessary to consider any of the provisions of that deed or of the earlier Act.

"The Act of 1870, after reciting and repealing the Act of 1853 and avoiding the deed of co-partnership, provided by Section 4 as follows: 'Notwithstanding the repeal of the recited Act and the avoidance of the said deed of co-partnership, the Association shall remain as from the passing of the said recited Act, and continue incorporated by the name of "The Imperial Continental Gas Association," for the

purpose of supplying, either exclusively by means of their own capital and property, or in conjunction with any other Company or party, any cities, towns, and places in foreign countries with gas, and by that name shall continue and be a body corporate, with perpetual succession and a common seal, with power to purchase, hire, and use, and also to sell any lands, buildings, stations' and so forth. By section 11 of that Act, the Companies Clauses Consolidation Act, 1845 (excepting the clauses with respect to the conversion of borrowed money into capital), and parts I., II., and III. of the Companies Clauses Act, 1863, as amended by, the Companies Clauses Act, 1869, were duly incorporated. It is not necessary to refer to any other of the sections of that Act. It is, however, necessary to refer to one or two of the sections of the Companies Clauses Consolidation Act, 1845, that were incorporated in the Act of 1870. Section 116 provides that: 'The Books of the Company shall be balanced at the prescribed Periods, and if no Periods be prescribed Fourteen Days at least before each Ordinary Meeting; and forthwith on the Books being so balanced an exact Balance Sheet shall be made up, which shall exhibit a true Statement of the Capital Stock, Credits, and Property of every description belonging to the Company, and the Debts due by the Company at the date of making such balance sheet, and a distinct view of the Profit or Loss which shall have arisen on the Transactions of the Company in the course of the preceding half year.' Then Sections 120 and 121, which are introduced by these words, 'And with respect to the making of dividends, be it enacted as follows,' provide, '120. Previously to every Ordinary Meeting at which a Dividend is intended to be declared the Directors shall cause a Scheme to be prepared, showing the Profits, if any, of the Company, for the period current since the preceding Ordinary Meeting at which a Dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of Dividend, among the Shareholders, according to the shares held by them respectively, the Amount paid thereon, and the periods during which the same may have

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been paid, and shall exhibit such Scheme at such Ordinary Meeting, and at such Meeting a Dividend may be declared according to such Scheme.' '121. The Company shall not make any Dividend whereby their Capital Stock will be in any degree reduced: Provided always, that the word "Dividend" shall not be construed to apply to a return of any portion of the Capital Stock, with the consent of all the Mortgagees and Bond Creditors of the Company, due Notice being given for that Purpose at an Extraordinary Meeting to be convened for that object.' That Act, as is well known, contains various provisions relating to the borrowing of money by a company on mortgage or bond, and the Companies Clauses Act, 1863, contains provisions as to the creation and issue by a company of debenture stock, and as to the remedies available to debenture stockholders whose interest may be in arrear. But the position and rights of a holder of debenture stock to which these provisions apply are so well settled by decisions of the Courts, to one of which I shall hereafter have occasion to refer, that I do not consider it necessary to refer to such provisions in detail.

"The next Act to which I must refer is the Association's Act of 1878. By that Act, after reciting that the whole of the Association's debenture or bond debt had been paid off, the whole of the share capital was converted into stock (Section 2), the Association's then existing powers of borrowing were repealed (Section 5), and by Section 8 it was provided as follows: 'Inasmuch as the Association have no power to carry on their operations within any part of the United Kingdom, they may from time to time (with the consent of three-fourths of the votes of the members present in person or by proxy at any general meeting or meetings specially convened for the purpose) reduce the nominal capital of the Association by returning to each member such sum in proportion to the amount of his holding of stock in the Association as may be determined by the meeting or meetings at which the reduction is decided on, and as from the date of the resolution deciding on such reduction the nominal

amount of the aggregate capital of the Association shall be deemed to be altered accordingly in all Acts of Parliament and documents affecting the Association.' By the defendant Association's Act of 1884 the Association were given power to borrow on mortgage or debenture and to charge their undertaking with repayment of any sums so borrowed with interest, and by their Act of 1893 it was provided that the total amount of principal debt outstanding should not at the time of issue exceed one-fourth of the capital of the Association then issued and fully paid.

"The only other Act to which I need refer is the Association's Act of 1916. After reciting, amongst other things, that, 'By virtue of the Act of 1884 as amended by the Act of 1893 the Association are empowered to borrow and reborrow on mortgage or debenture any sums not exceeding one-fourth part of the Capital of the Association for the time being issued and fully paid up and in exercise of such powers and of the powers conferred by the Companies Clauses Acts, 1863 and 1869, the Association have from time to time created and issued Debenture Stock to the aggregate nominal amount of one million two hundred and thirty-five thousand pounds bearing interest at the rate of three and one-half per centum per annum but no mortgages or debentures of the Association are at present outstanding,' it is provided by Section 3 amongst other things that, 'The powers of the Association shall be deemed to include and as from the passing of the Act of 1870 to have included the following powers (that is to say): Power to purchase, acquire, accept, hold and enjoy any shares, stock, mortgages, debentures or debenture stock or other security or interest of or in any Corporation Company Association or body carrying on any Undertaking in the United Kingdom or in any part of His Majesty's Overseas Dominions or in any foreign country of which the objects are similar to or connected with or incidental to the objects of the Undertaking of the Association; Power to sell, vary, exchange, let, lease, transfer, surrender or otherwise deal with or dispose of any such Undertaking as aforesaid or any similar Undertaking established by the Association under their statutory powers

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or any business, rights, contracts, concessions, privileges, shares, stock, mortgages, debentures or debenture stock or other security or interest possessed, granted to, carried on or held by the Association, whether singly or in conjunction with any other Corporation Company Association body or person, upon and subject to such terms and conditions and for such consideration whether in cash or in shares, stock, mortgages, debentures, debenture stock or other securities of or interest in any Corporation Company Association or body, or partly in one form and partly in another or others or for any other consideration as the Directors of the Association may think fit.' Section 9 of that Act provides, 'Notwithstanding anything in Section 8 of the Act of 1878 the Association shall not reduce their nominal Capital as provided by that Section unless simultaneously with such reduction they redeem any then outstanding Debenture Stock to a nominal amount equal to one-fourth part of the nominal amount by which the Capital of the Association is reduced.'

"Now it appears that in August 1914 the Association were possessed of valuable gas undertakings on the Continent, including gas undertakings in Berlin and other towns and places in Germany. On the outbreak of war all these German undertakings were placed under compulsory administration by the German Government and in August 1916 a decree was issued in Germany ordering their liquidation. By virtue of this decree the whole of the German undertakings were, with an immaterial exception, sold to various German Companies, or municipalities, in the years 1917 and 1918. When, therefore, the Treaty of Peace with Germany came into force, the Association duly filed with the proper authority a claim for compensation, and in response to that claim the proceeds of the sale of the German undertakings of the Association, amounting at the Peace Treaty rate of exchange to 5,625,896*l.*, were in due course paid over to the Association. The Association, however, claimed to be paid, in addition to this sum, compensation under Article 297 (*e*) of the Treaty of Peace in respect of damage or injury inflicted upon their property rights and interests in German territory, and this

claim has been finally agreed with the German Government at 1,600,000*l.* Only part of this latter sum has been paid up to the present time, but the Association have so far received in all from the German Government a sum of 5,864,594*l.* The German undertakings in respect of which this sum has been paid stood in the books of the Association at 4,397,400*l.* after writing off depreciation, so that the Association have realised so far a profit upon the book value of the undertakings of 1,467,194*l.*

"Out of the money so received from the German Government the directors, in pursuance of the powers conferred upon the Association by the Act of 1878, utilised part of the 4,397,400*l.* representing the book value of the German undertakings for the purpose of reducing the nominal capital of the Association from 4,940,000*l.* to 1,976,000*l.* by returning to the members the sum of 2,964,000*l.* Having regard to Section 9 of the Act of 1916, this involved the simultaneous redemption of at least one-fourth of the nominal amount of debenture stock that was then outstanding. Such redemption was duly made, the total sum so paid to the members and debenture stockholders amounting to 3,708,840*l.* The balance of the 4,397,400*l.* is retained as part of the assets of the Association. To all this, no objection is or can be raised.

"The directors, however, had next to consider how the book profit of 1,467,194*l.* should be dealt with, and they have decided to deal with it in this way. They propose to appropriate 1,228,495*l.* towards writing down various assets of the Association, and to treat the balance of 238,698*l.* as profit available for paying a dividend to the members. The legality of the application of this last mentioned sum in payment of a dividend is challenged by the Plaintiff in this action. It is challenged by him both in his capacity as a debenture stockholder and in his capacity as a member."

Hughes K.C. and *Hodge* for the plaintiff. The borrowing clauses of the Companies Clauses Consolidation Act, 1845, which are incorporated by the special Act of 1870, create an actual mortgage and no part of the capital can be returned

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without the consent of every mortgagee. The Companies Clauses Act, 1863, also incorporated, introduced debenture stock, the effect of which, as explained in *Gardner* v. *London, Chatham and Dover Ry. Co.* (1), is that although a specific charge is created nothing that is essential to the undertaking while it is a going concern can be seized under it; but that does not apply to moneys not required for the purposes of the undertaking and proposed to be distributed amongst the shareholders: *In re Tilt Cove Copper Co.* (2) In this case the debenture holders have a specific charge upon the German undertakings, and since those have been compulsorily sold free from the charge, the plaintiff as a debenture stockholder contends that the stockholders are entitled as between mortgagor and mortgagee to have the proceeds applied in payment of their debt.

As a member of the defendant company, the plaintiff contends that this distribution cannot be made. Companies registered under the Joint Stock Companies Acts stand on a different footing from those which come within the Companies Clauses Acts, and the decisions relating to the former, such as *Lubbock* v. *British Bank of South America* (3) and *Verner* v. *General and Commercial Investment Trust* (4), have no application to the latter. When once under the general and special Acts regulating the defendant association a permanent undertaking is constructed out of capital, it is not intended that any of the capital shall be returned to the shareholders, but that dividends shall be payable out of net revenue only. Sect. 121 of the Companies Clauses Consolidation Act, 1845, forbids payment of dividends whereby capital stock may be reduced, and the words "capital stock" mean "capital assets" generally. Sects. 116 and 120 of the same Act impliedly prohibit companies within the Act from paying a dividend out of a realized profit on its total capital assets. Under s. 116 the revenue account and the balance sheet must be kept separate and distinct; and under s. 120 dividends can only be paid out of profits disclosed by the revenue

(1) (1867) L. R. 2 Ch. 201.
(2) [1913] 2 Ch. 588.
(3) [1892] 2 Ch. 198.
(4) [1894] 2 Ch. 239.

account, into which no capital appreciation can be brought, and payment of any other dividend is forbidden. A dividend can only be declared out of the profits of the current period.

Alternatively, we submit that this is a reduction of capital within s. 9 of the defendants' own Act of 1916 and that the defendants must redeem simultaneously debenture stock to a nominal amount equal to one-fourth part of the amount by which their capital is reduced.

Clauson K.C. and *Howard Wright* for the defendants. Sect. 121 of the Companies Clauses Consolidation Act, 1845, contains the only restriction upon the payment of dividends by companies coming within that Act, by providing that the capital stock must not be thereby reduced. The same is the rule under the Joint Stock Companies Acts: *Trevor* v. *Whitworth* (1); *Lee* v. *Neuchatel Asphalte Co.* (2) Capital stock means the assets which represent and correspond with the capital subscribed to the stock of the company; that appears from s. 116. If, on a fair balance sheet, the defendants show a balance in their favour, they can distribute it. Their whole capital is intact, and the proposed distribution will not affect or reduce it. This is not a case of jeopardy. In the case of a company registered under the Joint Stock Companies Acts, it is clear that if the company has enough to return the whole of the capital and pay its debts, then, subject to its own articles, there is nothing in law to prevent it from making an immediate distribution amongst its shareholders: *Lubbock* v. *British Bank of South America* (3); *Foster* v. *New Trinidad Lake Asphalt Co.* (4) The same applies to the present case, and there is nothing illegal in the proposed distribution.

Further, the plaintiff has not a mortgage or charge on the undertaking: *Gardner* v. *London, Chatham and Dover Ry. Co.* (5); *Attree* v. *Hawe* (6); and unless there is jeopardy, he cannot bring an action to restrain this distribution: *Lawrence* v. *West Somerset Mineral Ry. Co.* (7) No jeopardy is shown, and

(1) (1887) 12 App. Cas. 409.
(2) (1889) 41 Ch. D. 1.
(3) [1892] 2 Ch. 198.
(4) [1901] 1 Ch. 208.
(5) L. R. 2 Ch. 201.
(6) 9 Ch. D. 337.
(7) [1918] 2 Ch. 250.

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there is nothing to bring this case within the decisions in *In re Tilt Cove Copper Co.* (1)

Hughes K.C. in reply referred to *Wall* v. *London and Provincial Trust.* (2)

Cur. adv. vult.

May 8. ROMER J. stated the facts above set out and continued: I will consider first of all the plaintiff's position as a debenture stockholder. As such he contends that the debenture stock constituted a specific charge upon the German undertakings and that, those undertakings having been compulsorily sold free from that charge, the debenture stockholders are entitled, upon the ordinary principles applicable as between a mortgagee and a mortgagor, to have the proceeds of such sale applied in the first place in reduction of their "debt." Alternatively he claims that no part of this 238,698*l.* can be paid to the members unless, simultaneously with such payment, the outstanding debenture stock is redeemed to the extent of one-fourth of the amount paid to the members. This alternative claim is based upon s. 9 of the Act of 1916, and it is, I think, sufficient to say in answer to it that the association are not proposing to reduce their nominal capital or to "return" anything to the members within the meaning of s. 8 of the Act of 1878.

In order, however, to deal with the plaintiff's first contention, it is necessary to see what is the position of a holder of debenture stock issued under the provisions of the Companies Clauses Act, 1863. There are several authorities to be found in the books dealing with this matter, but it is sufficient to refer to one of them only. In *Attree* v. *Hawe* (3) the Court of Appeal had to consider the question whether such debenture stock gives the holder thereof an interest in land within the meaning of the statute, 9 Geo. 2, c. 36. The judgment of the Court, consisting of Sir George Jessel M.R., James, Baggallay and Bramwell L.JJ., answering this question in the negative, was delivered by James L.J. In the course

(1) [1913] 2 Ch. 588.
(2) [1920] 1 Ch. 45; [1920] 2 Ch. 582.
(3) 9 Ch. D. 337, 349.

of his judgment he said: "But the case before us is really not that of a debenture, but of debenture stock. It seems to be called debenture stock, *lucus a non lucendo*, because it is anything but a debenture. There is no debt, except, indeed, as to the annual interest; the capital cannot be called in, and cannot be paid off. It is a right to a perpetual annuity, payable out of the concern. There is no conveyance or assignment of anything to the stockholder, or to any trustee for him. There is an entry in the books of the concern that there is so much debenture stock, on which there is so much to be paid half-yearly to the holders, just like the entry of the National Debt in the great books at the Bank of England. And the whole of the rights of a stockholder depend on the Act of Parliament authorizing railways and other bodies to create such a stock." Then, after reading ss. 22 and 23 of the Companies Clauses Act, 1863, and referring to s. 24, he said this: "So far it is quite clear that the stock is of the same nature as other stock of the company, only with the important difference that it ranks in payment over all other stock, and that all arrears must be paid before a farthing is to reach the proprietors of the other stock. It is nothing but preference stock with a special preference. There is nothing to give to the stockholders any right, either at law or in equity, under any circumstances, to take possession of a single item of the property of the company in specie, whether real or chattel." And then later on he says: "The only thing really chargeable is the net earnings of the company, the same fund out of which, if sufficient, the dividends and interest of the other stockholders are to be paid." Then towards the end of the judgment he says this: "By the 31st Section it is, no doubt, provided that, in all respects not otherwise by or under the Act or the special Act provided for, debenture stock shall be considered as entitling the holders to the rights and powers of mortgagees of the undertaking, other than the right to require the repayment of the principal money. But what are the rights and powers of mortgagees of the undertaking consistent with the powers conferred by the special Act on the railway directors? They are not

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powers to take the land or enter on the land, or in any way to interfere with the ownership, possession, or dominion of the statutory owners and managers. The result is that the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or charge or incumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is." Every word in these passages applies to the debenture stock of the association except that it can be paid off by the association. It follows that the debenture stock did not constitute a specific charge upon the German property, and that, inasmuch as no interest upon it is in arrear, there is no debt due to the debenture stockholders. They have no right to interfere with the ownership, possession or dominion of the association as the statutory owners and managers. If, therefore, the association are, having regard to their constitution, entitled as between themselves and their members to distribute the sum in question by way of dividend, the debenture stockholders have not, in my opinion, any right to object: and, even if the association are not so entitled, it is contended on the authority of *Lawrence* v. *West Somerset Mineral Ry. Co.* (1) that an action by a debenture stockholder to restrain the distribution cannot be entertained. I need not, however, further consider this latter contention. If the plaintiff be entitled to succeed on the motion as a member, he is in no worse position, and if he be not so entitled he is in no better position, by reason of his suing also as a debenture stockholder.

I proceed therefore to inquire whether the plaintiff in his capacity of member can successfully impeach the legality of the proposed distribution. Now if the association were a company registered under the Joint Stock Companies Acts, the legality of the proposed distribution could not, I think, be challenged successfully, unless of course it were in contravention of some special regulation of the company. The

(1) [1918] 2 Ch. 250.

power of such a company to distribute a realized profit on its capital assets was affirmed by Chitty J. in *Lubbock* v. *British Bank of South America* (1), and was recognized by Byrne J. in *Foster* v. *New Trinidad Lake Asphalt Co.* (2) In the latter case, a proposed distribution by way of dividend of a realized profit on an individual capital asset, without taking into account the value of the other capital assets, was held to be illegal. Byrne J., however, in his judgment laid down the law upon the point as follows: "It is clear, I think, that an appreciation in total value of capital assets, if duly realized by sale or getting in of some portion of such assets, may in a proper case be treated as available for purposes of dividend. This, I think, is involved in the decision in the case of *Lubbock* v. *British Bank of South America* (1), cited with approval by Lord Lindley in *Verner* v. *General and Commercial Investment Trust* (3), where he says: 'Moreover, when it is said, and said, truly, that dividends are not to be paid out of capital, the word "capital" means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realized and turned into money, which may be divided amongst the shareholders, as was decided in *Lubbock* v. *British Bank of South America.* (1)'" Then Byrne J. goes on: "If I rightly appreciate the true effect of the decisions, the question of what is profit available for dividend depends upon the result of the whole accounts fairly taken for the year, capital, as well as profit and loss, and although dividends may be paid out of earned profits in proper cases, although there has been a depreciation of capital, I do not think that a realized accretion to the estimated value of one item of the capital assets can be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken." In the present case it cannot be disputed that there has been a total appreciation of capital assets by at least the sum in question. It is not denied by the plaintiff that if the

(1) [1892] 2 Ch. 198. (2) [1901] 1 Ch. 208, 212.
(3) [1894] 2 Ch. 239, 265.

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proposed distribution be made every penny of the paid-up capital of the association will still remain intact. He says, however, that, whatever might have been the position had the association been registered under the Joint Stock Companies Acts, the authorities to which I have referred in no way conclude the question in the case of a company to which the Companies Clauses Consolidation Acts apply. But it was held by Eve J. in *Lawrence* v. *West Somerset Mineral Ry. Co.* (1), to which I have already referred, that for the present purpose there is no substantial distinction to be drawn between companies registered under the one set of Acts and companies that are governed by the other. With that decision I respectfully agree. In both cases the application of the paid-up capital of the company in payment of dividends is illegal. The only difference is that in the case of a company registered under the Joint Stock Companies Acts the application is not expressly prohibited by the Acts and in the Companies Clauses Consolidation Act, 1845, s. 121, it is. I will read that section again. "The Company shall not make any dividend whereby their capital stock will be in any degree reduced"; then there is the proviso. This section is the only express restriction on the company's power of paying a dividend to which my attention has been called, and the restriction is that the "capital stock" shall not be reduced. It is contended by the plaintiff that capital stock in this section means capital assets generally. I do not think so. The proviso to the section, which speaks of a "return" of portion of the capital stock, seems to me to indicate that capital stock means the paid-up capital of the company. I cannot, therefore, find any positive prohibition preventing a company to which the Act applies from paying a dividend out of a realized profit on its total capital assets. Is then such a prohibition to be implied? The plaintiff says that it is, by reason of ss. 116 and 120. His contention, as I understand it, is that s. 116 requires a company to keep its revenue account distinct and separate from its balance sheet, that the profits out of which dividends may be paid in

(1) [1918] 2 Ch. 250.

accordance with s. 120 are the profits disclosed by the revenue account into which he says no capital appreciation can be brought, and that the payment of any other dividend is impliedly forbidden. But what s. 116 says is that the balance sheet shall exhibit a distinct view of the profit or loss which shall have arisen on the transactions of the company in the course of the preceding half year. If therefore one of the transactions of the company has resulted in a realized profit from a capital asset it should, one would think, be brought within the scope of the "distinct view." Now in the present case the association have power to sell any part of their undertaking, and by receiving from the German Government the proceeds of the sale of their German undertaking may be treated as having affirmed and adopted such sale. The sale may therefore justly be considered for the present purpose as one of the company's transactions. Without, therefore, being in any way understood to accede to the plaintiff's contention that the payment of any dividend other than that mentioned in s. 120 of this Act is forbidden by implication, I come to the conclusion that in the present case the association have under the section itself power to distribute the realized profit by way of dividend amongst their members. The motion must be refused. (1)

Solicitors for the plaintiff: *Clapham, Fraser & Williams.*

Solicitors for the defendants: *Wigan, Champernowne & Prescott.*

(1) The parties subsequently agreed that the motion should be treated as the trial of the action, and that the action should be dismissed without costs. Order accordingly.

R. M.

END OF VOL. II. AND OF CHANCERY SERIES FOR 1923.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1923, will be as follows:—

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